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91-1845

No. -

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

VARIOUS RECEIVER-PLAINTIFFS,
PETITIONERS,

v.

VARIOUS RAILROAD-DEFENDANTS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 31 individual plaintiff-petitioners shall be deprived of their constitutional rights under the due process clause by virtue of the erroneous, unprincipled and discriminatory dismissal of 1700 freight damage cases by the District Court prompted by the unreasonable fear that docket congestion might cause unacceptable delays in the disposition of other cases, and because of the resultant "distortion of statistics." The dismissals were predicated upon the transparently specious guise of want of prosecution.

II. Whether the District Court for the District of Massachusetts, having erroneously rebuffed every effort by the plaintiff-petitioners to restore to the active docket 1700 freight damage cases administratively closed in 1980, by the purposeful disregard of the plain language of the rule under which they were closed, Rule III(H) of the Administrative Office of the Judicial Conference of the United States, may wrongfully and abusively apply Local Rule 41.1(b)(1) for the sole purpose of dismissal of the cases under the transparently specious guise of want of prosecution.

PARTIES

Receiver-Plaintiffs

Arrow Packing Co.; Boston Celery Co.; Boston Tomato Co., Inc.; B&R Produce; Community Suffolk, Inc.; Charles P. Sweeney d/b/a Sweeney Co.; D'Arrigo Bros., Inc.; Feinberg Co.; Felix Rocco Co.; Forlizzi Bros., Inc.; J.R. Freni; Frontier Produce Co.; Gilfenbain Bros., Inc.; W.H. Lailer Co.; Lampros Bros., Inc.; Matarazzo Bros. Co.; MarcoTomato Co.; Manhatten Tomato Co.; Mid N.E. Produce, Inc.; Nathan Warren and Sons; New England Farms; Prince Tomato Co.; A. Pelligrino & Sons; Royal Tomato Co.; Rodes & Sons Co.; Sawyer & Co.; A.J. Sarno d/b/a Sunlight Tomato, Co.; Stillman Produce Co.; Sunshine Tomato Co.; Tourtellot & Co.; William J. Canaan.*

Railroad-Defendants

Atchison, Topeka & Santa Fe Railway Co.; Bangor & Aroostock R.R.; Boston & Maine Corporation; Burlington Northern Line; Central Cal. Traction Co.; Chicago, Milwaukee, St. Paul & Pacific; Consolidated Rail Cor.; Florida East Coast Railway Co.; Holton Interurban; Illinois Central Gulf R.R.; Northwestern Pacific; Penn Central Transportation Co.; San Diego & Arizona Eastern; Seaboard Coastline Railroad Co.; Santa Maria Valley; Southern Pacific Transportation Co.; So. San Luis Valley R.R.; Stockton Terminal & Eastern; Sunset Railway; Texas Mexican Railway Co.; Trustees N.Y. N.H. & Hartford.

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*As testified by the Chief District Judge for the District of Massachusetts at United States Senate hearings in 1975 (*infra*), "The plaintiffs are the wholesale distributors of fruits and vegetables for Massachusetts and New England. Substantial distributors on the wholesale top level are involved." App. 15.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Various Receiver-Plaintiffs,[1] respectfully pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the First Circuit entered in the above-entitled proceedings on February 21, 1992.

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[1] The Petitioners have been referred to in all captions and pleadings in the courts below as "Various Receiver- Plaintiffs," the Respondents as "Various Railroad- Defendants," and the 1700 cases which are the subject of this Petition as the "Freight Damage Cases."

A full list of the parties is provided at p. iii.

OPINIONS BELOW

The Order of the Court of Appeals for the First Circuit of which review is sought is reprinted in the Appendix attached hereto, App. 1.

The Memorandum of the United States District Court for the District of Massachusetts (Tauro, J.), referred to and relied on by the First Circuit in its aforementioned Order of February 21, 1992, is reprinted in the Appendix attached hereto, App. 3.

JURISDICTION

The jurisdiction of this Court to review the Order of the First Circuit, dated and entered February 21, 1992, affirming the Order of the District Court for the District of Massachusetts, October 7, 1991, is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides:

> No person shall be . . . deprived of . . . property without due process of law . . .

RULES INVOLVED

Rule III(H) of the *Guide to Judicial Policies and Procedures*, App. 8, provides:

> If a case has been pending for more than three years and no action has been taken for more than twelve

> months, the clerk may submit a JS-6 form to remove the case as a pending matter. The procedural progress at termination should be shown. *The case should not be dismissed.*

If a minute entry is desired it may be phrased as follows:

> This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months, there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.
>
> *Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and, should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.*

(Emphasis added.)

Local Rule 41.1 of the Local Rules of the District of Massachusetts provides:

> (b)(1) [E]ach judge may from time to time give notice of not less than twenty (20) business days of hearing on a dismissal calendar for actions or proceedings assigned to that judge that appear not to have been diligently prosecuted.

STATEMENT OF THE CASE

SUMMARY STATEMENT OF THE CASE

Seventeen hundred (1700) freight damage cases, involvng thirty-one plaintiff-receivers from Massachusetts, Connecticut and Rhode Island were the subject of an unprecedented, discriminatory and unprincipled mass dismissal by the district court for the District of Massachusetts (Tauro, J.), on October 7, 1991. The ostensible basis given was "failure to prosecute," assertedly prior to and after 1987, with reference to a supposed unavailability of evidence. The speciousness of the reason given is revealed in the Court's own Memorandum, which refers to and specifically lists the Petitioners' "repeated efforts" to prosecute these cases. App. 4. The railroads are required by federal regulation to retain their records, 49 C.F.R. § 1220 *et seq.*, and these records have been produced at settlement conferences over the years. Affidavits as to past practice are available in the record of this case, and judicial notice may be taken as to recent state freight damage cases. Both these sources demonstrate that the requisite evidence to proceed is readily available.[2]

The underlying reason for dismissal of the cases is the district judge's expressed but unreasonable fear that continued prosecution would produce "intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases." App. 4. The Court of Appeals affirmed, "for essentially the same reasons," without elaboration. App. 1.

These cases have been the subject for over fifteen years of sometimes intense extrajudicial concern by the Chief Judges

[2] "[T]he defendant railroads, in compliance with Federal Regulations, have previously conveyed to the Plaintiff-Receivers all pertinent documents which resulted from their investigation of the freight loss and damage claims, and the Plaintiffs would be happy to return copies of Defendants' own documents should they have been lost or destroyed." App. 29.

of the district court for the District of Massachusetts and the Court of Appeals for the First Circuit, internally and externally. For example, at a hearing before the United States Senate Subcommittee on Improvements in Judicial Machinery on federal jurisdiction of freight damage claims, held on November 13, 1975, these judges "strongly, indeed fervently" supported a bill which they erroneously "believe[d], if enacted, would eliminate a glut of more than 7,000 small ICC cases presently congesting the docket of [the District of Massachusetts] court." App. 16. The requiring of a $10,000 freight damage claim for federal jurisdiction did nothing, however, to eliminate the legitimately filed cases already on the docket.

In 1978 the Penn Central Railroad, in an attempt to dismiss en-masse the thousands of pending cases, filed a civil action alleging unfair practices and abuse of process on the part of the Receiver-Plaintiffs. All railroads, over vehement objections of the Plaintiffs, suspended settlement practices awaiting resolution of the civil action. Every effort by the Plaintiffs to continue settlements were rejected by the railroads. All docket activity ceased.

In 1980, in an effort to eliminate the distortion of statistics for the federal docket, the court invoked Rule III(H) of the Guide to Judicial Policies and Procedures, and administratively closed for statistical purposes only, all freight loss and damage cases.

The civil action undertaken by the Penn Central Railroad was finally resolved in 1987. Immediately upon final adjudication, the Plaintiffs resumed settlement practices with the railroads. Four defendant carriers settled all outstanding claims. Five major carriers adamantly refused to settle the majority of the 1700 cases remaining outstanding, and it became apparent to the Plaintiffs that, so long as these cases were administratively closed, neither legal nor financial imperative existed to entice the reluctant railroads to settle.

The Plaintiffs undertook actions necessary to restore the cases to the active docket, the sine-qua-non for final disposition of the cases. Seventeen Hundred (1700) individual Motions to Bring Forward were filed covering the outstanding cases. All were denied. Sometime later, one (1) blanket Motion to Restore was filed. This was denied. Five separate Motions for Summary Judgment were filed on cases which had twice before been denied restoration to the active docket, and these were denied because the cases were not on the active docket. Finally, in a state of frustration, Plaintiffs filed a Motion for Determination of Status of the 1700 cases. At this point, Rule 41.1(b)(1) was invoked by the District Court and the 1700 cases were dismissed for "lack of prosecution," and because restoration of the cases "would produce intolerable congestion in this court's calendar, and unacceptable delay in the disposition of other pending cases." App. 4.

The courts below have successfully used judicial process to thwart every attempt by Petitioners to activate the administratively closed cases, notwithstanding the automatic right mandated by the plain terms of the very rule pursuant to which the cases had been closed.

Thus, in an effort to accommodate criminal and other civil cases, an act of gross discrimination has been committed against thirty-one Plaintiffs who, by virtue of the District Court's willful disregard of the plain language of Rule III(H), the Administrative Closing Rule, and its persistent denial to restore 1700 freight damage cases to the active docket, have now been deprived of their Constitutional rights under the Due Process Clause by the dismissal en-masse of said 1700 cases, not on their merits, but for purported failure to prosecute. The unprecedented dismissal of these cases for "want of prosecution," despite Petitioners' acknowledged "repeated efforts" to prosecute and the court's willful disregard of the automatic re-opening provision of Rule III(H), cries for relief in this Court.

1. *The Judges of the District of Massachusetts and the Court of Appeals for the First Circuit Have Long and Actively Sought to Rid the Federal Docket of the Many Freight Damage Cases.*

American railroads have, as an historical practice, used their massive bargaining position over the individual receivers of perishable produce to deny liability and reject and refuse to settle claims notwithstanding clear proof of liability and damages, as detailed by the Interstate Commerce Commission in a landmark decision, *Ex Parte No. 263*, 345 I.C.C. 515 (1972). Such was the practice in the District of Massachusetts, where the railroads' contumacious behavior was not diminished despite their virtually unbroken record of losing the freight damage cases that went to trial and established the law in the area.[3]

Although the railroads' tactic of forcing all meritorious claims into suits threatened to clog the civil justice system, since 1973 approximately ten thousand suits have been resolved through settlement conferences, under orders of the district judges, without a single case having been tried in the federal district court. Little, if any, court participation preceded settlement. An exhibit introduced by Judge Caffrey at a Senate Judiciary Subcommittee Hearing on creating a $10,000 claim requirement for federal jurisdiction of freight damage claims concluded:

> We do not anticipate any significant savings in judge time since a very small percentage of the I.C.C. cases actually go to trial.[4]

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[3] Several cases resulted in published opinions: *Condakes* v. *Southern Pacific Co.*, 295 F.Supp. 121 (D. Mass. 1968); *Sarno, d/b/a Sunlight Tomato Co.* v. *Southern Pacific Co.*, 277 F. Supp. 628 (D. Mass. 1967); *Condakes* v. *Southern Pacific Co.*, 303 F. Supp. 1158 (D. Mass. 1968). Not one of the litigated cases was appealed by the railroads.

[4] Exhibit VI, Hearing before the Subcommittee on Improvements in Judicial Machinery, November 13, 1975, p.23. In 1972, "1002 of these cases were disposed of in the federal court. Two of them were tried." William P. Westphal, Chief Counsel to the Subcommittee, Hearings, *supra*, p.31.

The real displeasure of the district judges in Massachusetts and the cause of "the deleterious effect of this clog of small cases . . . on the morale of the court," App. 12, was not docket congestion but the "*distortion of statistics*." The chief district judge testified:

> At a meeting of the metropolitan chiefs last week, Massachusetts had the longest median time for civil cases . . . [I]t is obvious that our pending time is being distorted by the presence of these cases . . . [T]hey sit there, and fester, and don't get much action, but they distort our statistics . . .
>
> Every time I go to a meeting of the metropolitan chief judges I have to explain this situation all over again. There are always some judges who are new and want it explained to them all over again.

App. 11-13.

Perhaps believing that the pending and legitimately filed freight damage cases would settle, as was the custom and practice, the chief district judge testified:

> *All members* of this court and *all members* of the Judicial Council of the First Circuit *strongly, indeed fervently*, support S-346 as a Bill *which we believe, if enacted, would eliminate a glut of more than 7000 small ICC* cases presently congesting the docket of this court.

Letter to Senator Quentin Burdick, dated November 5, 1975, submitted as exhibit at hearing. App. 15-16) (emphasis added).[5]

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[5] Similar sentiments were expressed at the hearing:

> The first point I wish to make, of course, is that the judges of our court, all eight of us, plus the three judges in the U.S. Court of Appeals sitting as a judicial council for the circuit, strongly endorse this bill *because it would eliminate what I have characterized as a glut of small ICC cases*.

App. 10 (emphasis added).

The Chief Judge of the First Circuit wrote to Senator Edward M. Kennedy:

> The removal of these cases would not only ease the flow of paper work in the clerk's office and, to some extent, relieve judges of the almost ministerial task of processing settlement agreements, but would remove from controversy the presence of such cases in the statistics of the Massachusetts court.
>
> Each member of the Council has read Judge Caffrey's letter and wishes to be recorded as *enthusiastically* approving it.

Letter of October 14, 1975, introduced as Exhibit at Hearings, *supra*, App. 20 (emphasis added).

A $10,000 jurisdictional requirement for Interstate Commerce Act cases was created — but the cases already filed necessarily remained on the docket.

2. *The Administrative Closings and the Litigated and Affirmed Propriety of the Filing of the Suits.*

In 1978, the Penn Central Railroad filed a civil action[6] in the District of Massachusetts, attempting to dismiss the thousands of pending freight damage suits en masse by challenging as an unfair practice and abuse of process the Receivers' filing of the thousands of suits. The practice and process of resolution of the cases through settlement largely ground to a halt as most railroads waited to see what effect these charges would have on the situation. The Receivers reluctantly acceded to those circumstances, thereby resulting in a period of inactivity, awaiting the resolution of the *Blanchette* allegations.

During the pre-trial period of *Blanchette*, on September 16, 1980, the Chief Judge of the First Circuit wrote to the Chief

[6] *Blanchette* v. *Cataldo*, Civ. No. 78-2368-S.

Judge of the district of Massachusetts, requesting that the pending freight damage cases be "statistically" closed pursuant to Rule III(H) of the *Guide to Judicial Policies and Procedures*:

> In particular, I remind you and your clerk of the rule approved by the Subcommittee on Judicial Statistics in 1973: that you can *statistically* close any civil case three years old or older to which no action appears imminent. (This can be found in the Statistical Analysis Manual, *Guide to Judicial Policies and Procedures*, Vol. 11, p. II-29).
>
> The [Judicial] Council [of the First Circuit] also requests a report from you by the end of October giving us information as to whatever action you may have taken and your best thinking of what further action should be taken to reduce this problem in your district.
>
> We would appreciate in particular some further planned initiative on the part of your court, e.g., use of special masters, to reduce as much as possible the remaining ICC-case backlog.

App. 6-7 (emphasis added).

In view of the inactivity occasioned by *Blanchette*, the cases were so administratively closed in 1980 pursuant to Rule III(H), which provides and concludes:

> *Nothing* contained in this minute entry *shall be considered a dismissal or disposition of this matter*, and, *should further proceedings in it become necessary or desirable, any party may initiate it* in the same manner as if this minute entry had not been entered.

App. 8 (emphasis added).

In 1982, the district court (Skinner, J.), sitting without a jury, upheld the propriety of the filing of the suits.[7] The Court of Appeals for the First Circuit affirmed:

> We add that we have reached this conclusion *after studying the parties' briefs with care and after reading all of the nearly 4,000 pages of record material* presented in the parties' briefs and appendices. *We undertook this effort* because familiarity with detail seemed necessary to understand the essence of the case and the likelihood of district court error, and because we wished to understand the details, *given the relationship of the case to the administration of justice within the circuit.*

Blanchette v. *Cataldo*, 734 F.2d 869, 872 (1st Cir. 1984) (emphasis added).

3. *Subsequent Efforts to Settle or Prosecute the Cases.*

After post-appeal litigation, the final order in *Blanchette* v. *Cataldo* was entered in February, 1987. Upon final adjudication, four defendant railroads settled all their pending cases. Serious settlement negotiations were conducted with regards to virtually all of the 1700 cases that are subject to this Petition. App. 28.

At hearings in October, 1987 district judge Tauro (the same judge whose later Order is the basis of this Petition), ordered global settlement discussions on the 1700 cases.[8] The discus-

[7] In the trial, the Freight Claims Manager of the Penn Central Railroad responsible for the handling of railroad claims testified that the policy of his railroad was to follow not the decision of the majority of the Supreme Court in the landmark freight damage decision, *Missouri Pacific R.R.* v. *Elmore and Stahl*, 377 U.S. 134 (1964), but rather the dissenting opinion!

[8] At hearings on subsequent motions in 1989 and 1990, district judge Tauro again *ordered* the parties to confer regarding settlement of all the remaining freight damage cases. Several times parties traveled across the country to settlement conferences, but discussions proved fruitless. App. 28-29.

sions broke down, and, in further efforts to prosecute the cases, the Petitioner-Receivers moved to place the remaining freight damage cases on the active docket — as a necessary prelude to settlement,[9] or trial if necessary. The motions to restore to the active docket were denied, despite the plain and mandatory wording of Rule III(H), allowing for the automatic re-opening of the cases.

4. *"Further Proceedings" Pursuant To Rule III(H).*

In 1990, in an additional attempt to avail themselves of the automatic re-opening provisions of Rule III(H), and specifically that segment which reads "and, should further proceedings in it become necessary or desirable, any party may initiate it," the Plaintiff-Receivers filed individual motions for summary judgment in five of the 1700 cases. The Motions for Summary Judgments, ipso facto, restored the cases to the active docket, and the motions were entitled to adjudication on the underlying merits of the cases.

District Judge Tauro ruled "that [the Summary Judgment] motions are essentially motions to reconsider and vacate this Court's prior orders [the denial of two previous motions by Plaintiff-Receivers to restore the cases to the active docket]. This court declines to do so." Thus, the Motions were incorrectly denied on procedural grounds and the cases were neither restored to the active docket nor adjudicated on their merits.[10]

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[9] The "state of limbo . . . provide[d] [defendant-railroads] neither the legal nor the financial incentives for the cases to be resolved on their merits." App. 31.

[10] The litigation history and efforts to activate and prosecute the cases are summarized in part in a footnote in the district court's Memorandum

5. The Unprincipled Dismissal of the Cases.

In June, 1991, confronted with the enigma that the court would neither restore the cases to active docket nor allow any "further proceedings" unless the cases were first restored, the Petitioners filed a Motion for Determination of Status of Cases. On July 17, 1991, district judge Tauro issued an order to show good cause why the freight damage cases should not be dismissed for "want of diligent prosecution" pursuant to Local Rule 41.1(b)(1), which allows for the dismissal of cases "that appear not to have been diligently prosecuted." The Petitioners' response recited the diligent prosecution in which they had in fact been engaged, including actions taken within the last year, and stated that they continued to stand ready for trial.

On October 7, 1991, characterizing "plaintiffs' [Petitioners'] repeated, unsuccessful efforts at restoration" as "this history of inaction," District Judge Tauro dismissed all of the remaining freight damage cases " for want of prosecution." App. 4.

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of October 7, 1991 dismissing the cases for "failure to prosecute" prior to 1987:

> In more recent history, these cases were the subject of a motion to "bring forward" [pursuant to Rule III(H)] that this court denied, after hearing, on February 5, 1988. On February 23, 1988, this court denied plaintiffs' motion for reconsideration. There was no appeal.
>
> In April 1989, various receiver- plaintiffs filed motions to "restore" these same 1700 cases. On July 27, 1989, after hearing, this court denied the motion, and stated its reasons in an accompanying memorandum. Plaintiffs appealed, but later withdrew the appeal before it was acted upon.
>
> In 1990, plaintiffs filed motions for summary judgment in five of these cases. This court treated those motions as motions to reconsider and to vacate its prior orders and denied them in a Memorandum dated September 10, 1990. Plaintiffs appealed, but, in an Order dated January 3, 1991, the First Circuit allowed the defendant's appellees' motion to dismiss the appeal for failure to present a substantial question.

App. 3-4.

The underlying supposed justification was that resolution of the cases "would produce intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases." App. 4. Perhaps subconsciously revealing the congestion-driven motivation of the judges who had previously petitioned the Congress on this matter, he added, "the Court of Appeals has already upheld the dismissal of these lawsuits." App. 5.[11]

The First Circuit affirmed, "essentially for the reasons stated in the district court's memorandum of October 7, 1991," without elaboration. App. 1.

The Various Receiver-Plaintiffs respectfully petition this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

It is respectfully urged that this Court grant Certiorari to interpret and authoritatively pronounce the plain meaning of Rule III(H), to correct the abusive exercise of inherent power by the courts below, and to resolve the increasing tension between docket congestion and the integrity of the judicial process in favor of the rule of law and the rights of civil business litigants. All courts and all civil litigants would be benefited by such action of this Court, notably in these days of threatened strangulation of civil case dockets by criminal cases.

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[11] In dismissing an appeal of the denial of five receiver-plaintiffs' rights to move for summary judgment, the First Circuit had stated in obiter dictum on an issue not presented in the railroads' motion to dismiss the appeal, "the underlying cases, being stale, were properly dismissable for want of prosecution." App. 5.

I. THIS COURT SHOULD GRANT CERTIORARI TO EXPLICATE THE PLAIN MEANING OF THE AUTOMATIC RE-OPENING PROVISION OF THE RULE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON ADMINISTRATIVE CLOSINGS OF CASES, AND TO REQUIRE DISTRICT COURTS TO ADHERE TO IT.

As an important exercise of its supervisory power over the federal courts, this Court has traditionally granted Certiorari to review the validity and construction of federal rules of procedure,[12] local district rules,[13] and Circuit court rules.[14] See generally, "The Supervisory Power of the Federal Courts," 76 Harvard Law Review 1656 (1963), cited by this Court in *Frazier* v. *Heebe, supra* at fn. 12.

Supervisory power should be exercised here to pronounce the plain meaning of the rule of the Administrative Office of the Judicial Conference of the United States [15] on administrative

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[12] *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); *Hickman* v. *Taylor*, 329 U.S. 495 (1947) (discovery of attorney work-product under federal rules); *Schlagenauf* v. *Holder*, 379 U.S. 104, 109 (1964) (Rule 35, regarding the ordering of mental and physical examinations of a defendant).

[13] *Frazier* v. *Heebe*, 482 U.S. 646 (1987) (overruling residence requirements for bar of district court).

[14] *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 267 (1953):

> We hold that . . . whatever the [en banc] procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it; . . . .

[15] The *Guide to Judiciary Policies and Procedures* is the official medium of the Administrative Office of the United States Courts. *Ibid.*, Vol.I, ch.I, p.1.

The Administrative Office was created by an act of Congress, 28 U.S.C. § 603, and is subject to the supervision and direction of the Judicial Conference of the United States. 28 U.S.C. § 601.

The Judicial Conference is comprised mainly of the Chief Justice of the United States and the Chief Judges and a district judge of each judicial circuit. 28 U.S.C. § 331.

closings, and to require district courts to adhere to it. Rule III(H) of the Guide to Judiciary Policies and Procedures provides:

> Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and should further proceedings in it become necessary or desirable, *any party may initiate it in the same manner as if this minute entry had not been entered.*

App. 8 (emphasis added).

This mandatory provision, automatic in application, could hardly be more clear. Yet, despite the several and strenuous efforts of the Petitioner-Receivers to "initiate further proceedings," the district judge dismissed, "[i]n light of this history of inaction and the administrative status of these cases." App. 4. The circumstances of this matter call for this Court to grant Certiorari and instruct all courts and affected litigants that, regardless of fears of docket congestion or of the "distortion of statistics," due process and the rule of law require that the plain wording of the rule be respected.

II. THIS COURT SHOULD GRANT CERTIORARI TO INSTRUCT THE JUDICIARY THAT INCREASING TENSION BETWEEN DOCKET CONGESTION AND THE INTEGRITY OF THE JUDICIAL PROCESS MUST BE RESOLVED IN FAVOR OF THE RULE OF LAW.

In 1962 in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 631, fn. 7 (1962), relied upon by the district judge below, this Court stated, "in the more populous districts . . . calendar congestion has become a severe problem." In 1975 at the

Congressional freight damage hearings, *supra*, Chief District Judge Caffrey stated, "The impact of the criminal docket has kept the youngest and most vigorous of our six judges trying nothing but criminal cases all year." App. 21. The situation is *far worse* now.

Huge increases in the number of civil and criminal actions generally, and burdensome increases in drug cases and habeas corpus petitions particularly, have caused serious docket backlog, disturbing to parties and judges. But the serious problems of case overload and backlog do not grant license to discriminate against other parties, and are no excuse for the continued prejudice against thirty-one Plaintiff-Receivers by the dismissal of 1700 legitimately filed and meritorious freight damage cases here. It is contradictory, and logically and constitutionally impermissible, for "repeated efforts at restoration" to be termed "this history of inaction" and it is even more outrageous and incomprehensible that motions for summary judgment on five cases, which on two different occasions had been denied restoration to the active docket, should have been dismissed because they were *not* on the active docket. All of this was done by the District Court and approved by the First Circuit. It is a denial of procedural and substantive due process of law to prevent successful action on a case or group of cases and then pretend that there has been no action and dismiss for "want of prosecution."

In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), this Court granted Certiorari and reversed the remanding of a case to state court because of the crowded condition of the federal court docket. In language fully applicable to the instant Petition, this Court stated:

> It is indeed *unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed* in or removed to that court in accordance with

> the applicable statutes. But an otherwise properly removed action may no more be remanded *because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed* or referred to state courts for such reason.

Ibid. at 344 (emphasis added).

The district court's unreasonable fears [16] of the "intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases" are no excuse. While this Court may take judicial notice of the well-publicized and long-standing shortage of federal judges in the district of Massachusetts, "[C]rowded dockets do not excuse compliance with rules and statutes." *Johnson* v. *Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990), summarizing *Jones* v. *Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978). The words of the district court for the Southern District of New York in denying a motion to dismiss for failure to prosecute are also relevant here: "[A]lthough this court's dockets are among the busiest in the nation, [plaintiff] has a due process right to present her case in court." *Freed* v. *Braniff Airways, Inc.*, 119 F.R.D. 10, 11 (S.D.N.Y. 1987). In the instant matter as in *U.S. Industries, Inc.* v. *Blake Const. Co.*, 671 F.2d 539, 551 (D.C. Cir. 1982), "the real reason for dismissal was convenience of judicial administration. That is not a valid ground for dismissing a properly asserted claim."

The Assertion of Want of Prosecution Was a Transparently Specious Guise

The cases at issue were dismissed under the guise of want of prosecution, but the record shows that there has been no

[16] The fears are unreasonable because the cases would likely settle if on the active docket. If not, the use of special masters, as suggested by the Chief Judge of the First Circuit, App. 7, and consolidation of cases pursuant to Local Rule, as suggested by Petitioners, could be employed.

failure to prosecute. During and after 1987, there were court-ordered settlement conferences and intensive and extensive prosecution through the filing of motions to restore the cases to the active docket and motions for summary judgments. The district judge's reaching back to 1987 and before in an attempt to find want of prosecution was without factual or legal basis.

First, there should not be dismissal for inactivity where there was related litigation activity, as there was in the case challenging the propriety of the suits, *Blanchette* v. *Cataldo. S.E.C.* v. *Everest Management*, 466 F.Supp. 167, 171 (S.D.N.Y. 1979); *Markel* v. *Scovil Mfg Co.*, 657 F.Supp. 1102, 1105 (W.D.N.Y. 1987). Second, there were undeniable and undenied settlement conferences and actual settlements before, during, and after *Blanchette*. Even in the context of a single case, settlement activity is sufficient to withstand a motion to dismiss for failure to prosecute. *Feif* v. *A.H. Robbins*, 90 F.R.D. 526, 530 (E.D. Penn. 1981). A fortiori here, where settlement activity was the accepted and in fact court-ordered method of prosecution, before *and after* 1987.

Further, the cases may not now be dismissed for claimed prior inactivity. "[I]f the claim is presently being prosecuted with diligence it cannot be dismissed because at some earlier time plaintiff did not act diligently." Wright & Miller, *Federal Practice and Procedure*: Civil § 2370, p. 204; 2B Barron & Holtzoff, *Federal Practice and Procedure*, 918, pp. 139-40; *RAAB* v. *Taber Instrument Corp.*, 546 F.2d 522, 524 (2nd Cir. 1976) ("breathed new life into dormant cases"); *Rollins* v. *United States*, 286 F.2d 761 (9th Cir. 1961); *Applebaum* v. *Ceres Land Co.*, 546 F.Supp. 17, 22 (D.Minn. 1981) ("Furthermore, Levitt is now prosecuting the claim with diligence. It would be inappropriate for the Court to grant Ceres' motions at this time."); *United States* v. *Myers*, 38 F.R.D. 194, 197 (N.D.Cal. 1964). Furthermore, there has been significant docket activity and diligent prosecution of the cases not only over

the years but also specifically and extensively within the last year.

"The writ [of certiorari] is appropriately issued . . . when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenaut* v. *Holder, supra*, 379 at 110. Foremost among "the character of reasons that will be considered" in determining when this Court will grant a petition for a Writ of Certiorari is, "When a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). This is such a case. The "strong, indeed fervent" feelings of the judges in the courts below concerning docket congestion and the "distortion of statistics" caused by these legitimately filed and meritorious cases cannot be allowed to displace due process of law.

CONCLUSION

Therefore, based on the foregoing reasons and authorities, the Petitioners respectfully urge that a Writ of Certiorari be granted.

Pursuant to Supreme Court Rule 16.1, this Court may order a summary disposition, instructing the courts below to allow the reactivation of the 1700 freight damage cases that are the subject of this Petition.

Respectfully submitted,

MORRIS M. GOLDINGS
Counsel of Record

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MAHONEY, HAWKES & GOLDINGS
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(617) 439-7600
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May 21, 1992

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91-2188

VARIOUS RECEIVERS, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

VARIOUS RAILROADS, ET AL.,
DEFENDANTS, APPELLEES.

Before

TORRUELLA, *Circuit Judge*,
CAMPBELL, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

ORDER OF COURT

Entered February 21, 1992

We have considered the motion to dismiss and the opposition thereto, including appellants' brief, and the record on appeal. We agree with appellees' contention that no substantial question is presented and affirm essentially for the reasons stated in the district court's memorandum of October 7, 1991.

Affirmed. Loc. R. 27.1.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs. Goldings, Chused, Gleason, Ferriter, Inselise, Osborne and Ms's. Insoft, Lipton]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases[1]

Various Railroad-Defendants,
Defendants.

ORDER

October 7, 1991

TAURO, D.J.

For the reasons stated in the accompanying Memorandum, this case is hereby dismissed, with prejudice.

/s/ _____
United States District Judge

[1] A complete list of all these cases is listed in the Appendix attached to the Memorandum.

A3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases[1]

Various Railroad-Defendants,
Defendants.

MEMORANDUM

October 7, 1991

TAURO, D.J.

On June 27, 1991, plaintiffs filed a Motion for Determination of Status of Cases with respect to approximately 1700 interstate freight damage cases that were administratively closed more than a decade ago.[2] In a prior Memorandum, this court noted

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[1] A complete list of all these cases is listed in the Appendix attached to the Memorandum.

[2] In more recent history, these cases were the subject of a motion to "bring forward" that this court denied, after hearing, on February 5, 1988. On February 23, 1988, this court denied plaintiffs' motion for reconsideration. There was no appeal.

In April 1989, various receiver-plaintiffs filed motions to "restore" these same 1700 cases. On July 27, 1989, after hearing, this court denied the motion, and stated its reasons in an accompanying memorandum. Plaintiffs appealed, but later withdrew the appeal before it was acted upon.

In 1990, plaintiffs filed motions for summary judgment in five of these cases. This court treated those motions as motions to reconsider and to vacate its prior orders and denied them in a Memorandum dated September 10, 1990. Plaintiffs appealed, but, in an Order dated January 3, 1991, the First Circuit allowed the defendants-appellees' motion to dismiss the appeal for failure to

that "despite their successful opposition to defendants' stay request, plaintiffs did nothing to prosecute these cases [for] . . . nine years." Memorandum dated July 27, 1989 at 2. In fact, the cases were administratively closed in 1980 and, following plaintiffs' repeated, unsuccessful efforts at restoration, remain so even to this day. In light of this history of inaction and the administrative status of these cases, this court issued an Order dated July 17, 1991 pursuant to Local Rule 41.1(b)(1) requiring the parties to attend a hearing on September 27, 1991 to show cause why these cases should not be dismissed for want of diligent prosecution.

In response to this Order, both parties filed Certificates in compliance with Local Rule 41.1.(b)(1). This court then conducted a hearing on the issue of dismissal on September 27, 1991. Plaintiffs have failed to identify any good reason, either in their Certificate or at the September 27, 1991 hearing, which would justify the nine-year delay in prosecution of these cases. This prolonged period of unjustifiable inactivity has allowed the evidentiary trail in these cases, some of which are twenty years old, *see, e.g.*, CA Nos. 70-1398-F and 71-939-G, to cool to the point where resolution of the underlying factual issues would be so difficult and time consuming that it would produce intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases. *See Link* v. *Wabash Railroad Co.*, 370 U.S. 629-30 (1962). Moreover, so long a delay has substantially prejudiced the defendants, as witnesses' memories have faded and physical evidence has disappeared. *See Boudwin* v. *Graystone Ins. Co., Inc.*, 756 F.2d 399, 401 (5th Cir. 1985). The parties have not suggested any lesser sanction, short of dismissal, which would address these concerns, and this court, on its own considera-

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present a substantial question. *Various Receiver Plaintiffs* v. *Penn Central Transportation Co., et al.*, No. 90-1963 slip op. at 2 (1st Cir. Jan. 3, 1991).

tion, finds no other adequate alternative. *See id.*; *Locascio* v. *Teletype Corp.*, 694 F.2d 497, 499 (7th Cir. 1982). Indeed, the Court of Appeals for the First Circuit has already upheld the dismissal of these lawsuits, noting that "the underlying cases, being stale, were properly dismissible for want of prosecution . . . ." *Various Receiver Plaintiffs* v. *Penn Central Transp. Co., et al.*, No. 91-1963, slip op. at 1 (1st Cir. Jan. 3, 1991). Accordingly, this court exercises its inherent power to dismiss *sua sponte* for lack of prosecution, *see Link*, 370 U.S. at 639-31, and orders the dismissal, with prejudice, of all these actions.

An Order will issue.

/s/ _____
United States District Judge

A6

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

156 FEDERAL STREET
PORTLAND, MAINE 04112

September 16, 1980

Honorable Andrew A. Caffrey
Chief Judge, U.S. District Court
1503 Post Office and Courthouse
Boston, Massachusetts 02109

Dear Chief Judge Caffrey:

Acting on behalf of our Judicial Council, I am enclosing the latest print-out of civil cases pending as of June 30, 1980 three years or more. Mr. Foley tells us that the percentage of such cases to total civil cases nationally is 11.7% — an all time high.

We have no desire to put you or your clerk to fruitless work but ask that, with your clerk's help, you go over the list to identify cases which may be susceptible to some kind of action. You may be able to identify some problems that may account for a number of old cases. In particular, I remind you and your clerk of the rule approved by the Subcommittee on Judicial Statistics in 1973: that you can statistically close any civil case three years old or older to which no action appears imminent. (This can be found in the Statistical Analysis Manual, Guide to Judicial Policies and Procedures), Vol. 11, p. II-29).

The Council also requests a report from you by the end of October giving us information as to whatever action you may have taken and your best thinking of what further action should be taken to reduce this problem in your district.

We would appreciate in particular some further planned initiative on the part of your court, e.g., use of special masters, to reduce as much as possible the remaining ICC — case backlog.

We shall much appreciate your cooperation in this effort.

Sincerely,

Frank M. Coffin

trans. 10 vol. XI
July 1, 1978

Special Situations

Three-year old cases

If a case has been pending for more than three years and no action has been taken for more than twelve months the clerk may submit a JS-6 form to remove the case as a pending matter. The procedural progress at termination should be shown. The case should not be dismissed.

If a minute entry is desired it may be phrased as follows:

> This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.
>
> Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and, should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.*

*Approved by the Subcommittee on Judicial Statistics April 26, 1973.

A9

FEDERAL JURISDICTION OF FREIGHT DAMAGE CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRES

SECOND SESSION

ON

S. 346

NOVEMBER 13, 1975

Printed for the use of the Committee on Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON: 1976

STATEMENT OF HON. ANDREW A. CAFFREY, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Judge CAFFREY. I think the letter I sent to the committee gives you an outline of what I had in mind for my presentation. I have prepared a number of exhibits which I will refer to. I brought along three sets of the exhibits if the committee would care to receive them.

Senator BURDICK. They will be received as part of the record without objection.

Judge CAFFREY. The first point I wish to make, of course, is that the judges of our court, all eight of us, plus the three judges in the U.S. Court of Appeals sitting as a judicial counsel for the circuit, strongly endorse this bill because it would eliminate what I have characterized as a glut of small ICC cases.

Exhibit I shows the statistics as of the first of the month. There were 7,191 ICC cases pending in Massachusetts. I had my staff prepare and analyze a list of the actual figures involved in the closing of two groups of these cases.

Exhibit I(a) includes all cases filed in the calendar year 1973 and assigned to me personally. All of those cases have been closed as of the time my secretary transcribed the figures.

They amounted to 206 cases. You will see that the exhibit gives the docket number, the filing date, the addendum, the closing date, and the dollar amount of settlement.

At the last page, I summarize the dollar amount. You will see that 20 of the cases were closed without any payment whatsoever; 57 of them were settled for something between $100 and $300; 36 were between $300 and $500; 49, $500 up to $1,000 and the rest, some figure over $1,000. To update this, I had my staff make a second exhibit, exhibit I(b). This time we took all of the cases for the entire court filed in the calendar year 1974 and closed as of October 24, 1975.

Again, I have the same information as I just mentioned with reference to these cases. You will see the column totals are that 50 of these were closed without payment, 43 less than $300, 32 less than $500, 34 less than $1,000, and 19 for something over $1,000.

In total, these exhibits reflect the fact that of 384 cases, 62 percent were settled for less than $500, 84 percent closed out for less than $1,000. The largest dollar amount involved in any case was $3,700. Only eight of them involved a figure over $3,000.

I have acquired a second piece of evidence which I refer to in my letter and that is an IBM runoff.

The Administrative Office of the U.S. Courts ran off a computer printout of all the ICC cases filed with us from 1970 through 1972, which were still pending as of June 1975. That document reflects that as of June 30, the end of the fiscal year, there were 175 of the cases pending which means all of those have got a pending time of at least 42 months.

There were 700 of those cases filed in 1972 which are still pending and that means they have a minimum pending period of 30 months, or a median of 36 months. There were still nine cases pending since 1970 which means they were 54 months old.

I mention this for this reason. At a meeting of the metropolitan chiefs last week, Massachusetts had the longest median time for civil cases. It was 19 months. If you crank into your average statistics these periods of 54, 42, and 30 months, it is obvious that our pending time is being distorted by the presence of these cases.

These cases pend, and pend, and pend for the simple reasons that the requirements of the speedy trial act, with the priority given to civil rights cases and other emergency matters, these cases do not get much judge attention. The result is that they sit there, and fester, and don't get much action, but they distort our statistics.

I should say that these cases do not involve any practical use of the Federal Rules of Civil Procedure or the Federal discovery tools. There is nothing about these cases that they require Federal court as the forum.

Exhibit II is a sample pleading which I just signed the day before yesterday showing you the printed complaint, the routine answer, the agreed statement of fact, and a piece of paper I signed. That can be done in any court. That can be done in a justice of the peace court as well as a Federal court as a practical matter.

Senator BURDICK. That is mass production.

Judge CAFFREY. Without any question, Senator.

Exhibits III, IV, and V are the three relevant documents from the State courts. I have the opinion of the judge in the municipal court who tried the case, and that of the three-judge appellate court. It took Mr. Infelise 1 year to get from the trial court to the Supreme Court of Massachusetts. He got the original ruling in June 1967 and 3 days short of 1 year he got the supreme court ruling.

Mr. Infelise, having gotten a favorable ruling, declined to take his business back to the State courts where similar cases are handled in every other one of the 50 States, as far as I know.

I would like to call attention to the fact that Mr. Kirks in his annual report has a very specific comment as to the deleterious effect of this clog of small cases. I could say also on the morale of the court. In all other Federal district courts, this type of case is less than one-half of 1 percent of the total caseload.

Our court has 64 percent of all cases pending in the country. Exhibit VI shows the extra costs to the taxpayers and I think the figure was $62,000 in the exhibit.

Exhibit VI(a) shows that these figures have been slightly changed. The figure has been changed from $62,000 to $66,000 as a result of the recent 5 percent pay raise to Federal employees.

Senator BURDICK. It will be received without objection.

Judge CAFFREY. Thank you.

I would like to point out that what has happened in Massachusetts could happen in any State other than Florida or California. Every time I go to a meeting of the metropolitan chief judges I have to explain this situation all over again. There are always some judges who are new and want it explained to them all over again.

That plus the exhibits pretty much covers what I had in mind for presentation.

If there is anything I omitted to say, I think it is in my letter to the committee.

Senator BURDICK. Thank you, judge. You presented your case very precisely. I got the picture in a hurry.

I have a few questions for you. In your testimony before this committee when we were considering the omnibus district judgeship bill, you recommend a jurisdictional limit from $3,000 to $5,000. Do you have any opinion as to what is preferable, $10,000 as in this bill or something lower?

Judge CAFFREY. The $10,000 would be much more realistic. I did not think it was my job to tell the Senate what they ought to do about it but if the Senate picked 10, I support that.

Senator BURDICK. I assume that exhibit I(a) and exhibit I(b) are a sampling.

Judge CAFFREY. The first group are all my cases which were closed as of a certain date and the second exhibit is the cases that were registered with all the judges.

Senator BURDICK. Do you think this is a representative sampling?

Judge CAFFREY. Yes.

Senator BURDICK. These cases were handled in State court but have moved to your court after an erroneous State court ruling. What was the nature of the case?

Judge CAFFREY. It was a routine case of this type in which the trial judge admitted the certificate of the State inspector.

The trial judge admitted that as evidence. The appellate division of the municipal court made a wierd ruling in which they construed the words "the courts of the United States" as excluding all State courts.

They also ruled these were not business records. The Supreme Court said we won't go into the question whether the State court is included in the phrase "courts of the United States" because the records were business records of the Department of Agriculture.

It is immaterial that they were not business records of the shipper. They reversed the appellate division and ordered that these records be admissible in courts in Massachusetts.

Senator BURDICK. The trend of cases did not reverse?

Judge CAFFREY. No, sir. The cases have been with us ever since.

Senator BURDICK. I would like your opinion on the argument that perhaps this bill is an overkill and that the cure is more harmful than the disease. Would the denial of access to the Federal court prejudice the small plaintiff and how do State procedures differ?

Judge CAFFREY. These cases do not involve the use of any of the Federal Rules of Procedure, particularly with reference to pretrial discovery. The State courts have recently adopted the Federal Rules of Civil Procedure as the rules of procedure for the State of Massachusetts.

At the same time procedural things available in our court are now available in the State courts. The entry fee in the State court is $5. It is $15 in our court. It costs the plaintiff 3 times as much to come into our court as in a State court.

Second, every other plaintiff in every other State except Massachusetts, who is using the appropriate court of that particular State is in the State courts.

I am conversant with what is going on in other Federal courts. It is just a fluke and a freak that we have them and

nobody else does. The plaintiffs are the wholesale distributors of fruits and vegetables for Massachusetts and New England.

Substantial distributors on the wholesale top level are involved.

Senator BURDICK. The plaintiff is not prejudiced by being in State court?

Judge CAFFREY. I say no.

Senator BURDICK. These cases are nearly always settled and you have stated that little, if any, court participation precedes settlement. Would this be changed in the State court?

Judge CAFFREY. I am not that conversant with what Mr. Infelise would do but he can explain his problems better than I. I understand he has to get court action so the defendant carrier can get contributions from connecting carriers.

Senator BURDICK. Thank you very much, judge. You have been very helpful. I commend you for keeping it within the limits of time.

Judge CAFFREY. I think I have a fairly fast moving courtroom.

[Exhibits submited by Chief Judge Caffrey follow:]

UNITED STATES DISTRICT COURT
Boston, Mass., November 5, 1975.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Senate Office Building, Washington. D.C.

DEAR SENATOR BURDICK: In response to your letter of October 21, 1975, requesting that I submit a statement regarding my intended testimony relative to S-346 to the subcommittee at least forty-eight hours before the scheduled hearing date, I wish to advise that I plan to testify substantially as follows:

All members of this court and all members of the Judicial Council of the First Circuit strongly, indeed fervently, support

S-346 as a Bill which we believe, if enacted, would eliminate a glut of more than 7,000 small ICC cases presently congesting the docket of this court.

My office has prepared and I plan to file with the committee two exhibits analyzing the dollar amounts involved in 206 cases filed in 1973. The other exhibit covers 178 cases filed in 1974. Both exhibits establish that the vast majority of these 384 cases were settled for ridiculously low figures as compared to the cost of processing litigation in the federal court.

I am also prepared to file an exhibit setting out the pending case statistics for the individual members of this court as of November 1, 1975, which will show that as of that date there were 7191 of these ICC cases pending.

I next plan to file as exhibits and to discuss with the committee, if requested to do so, the opinion of the Supreme Judicial Court of Massachusetts in *Sawyer & Company* v. *Southern Pacific Company*, 354 Mass. 481, as well as the report of a judge of the Boston Municipal Court who rendered the original decision in that case, and an opinion of the appellate division of the Boston Municipal Court. These opinions, between them, constitute the historical fluke which brought this mass of ICC cases to this court. The erroneous ruling by the Appellate Division appears to be the prime reason that the District of Massachusetts is presently saddled with 64.1% of all the ICC cases filed among the total of 93 federal district courts.

I would respectfully plan to testify to the committee that although Massachusetts presently is the only federal district court on whose dockets small ICC cases amount to more than one-half of 1% of the total docket, it is nevertheless true under the present version of 28 U.S.C. § 1337 that any metropolitan federal court located in any state other than Florida, California and possibly Arizona, could be inundated with a mass of identical cases should counsel in any of those metropolitan areas

elect at any future time to use the federal rather than the state courts that they are presently using.

I will be prepared to explain to the committee the degree of judge-participation necessary to dispose of these cases and to explain why they cannot be settled by counsel without judicial participation in the settlement procedure.

I next plan to advise the committee that I have arranged to have a representative of the Financial Management Division of the Administrative Office of the United States Courts present at the hearing for the purpose of testifying as to the actual cost to the United States of processing these cases in this court.

Lastly, I would like to file with the committee as an exhibit, my letter of September 16, 1975 to the Honorable Edward M. Kennedy, which discusses in detail the impact of these cases on this court's operation and which includes an evaluation thereof contained in the Annual Report of Mr. Rowland Kirks, Director of the Administrative Office of the United States Courts.

I would also like to advise the committee that the most recent Administrative Office statistics establish that the median time for disposing of civil cases in this court is 19 months, the highest median in the entire federal court system. It is my opinion that this long median is due in large part to the longevity of these ICC cases.

The last exhibit I plan to file with the committee is a letter written on October 14, 1975 by Chief Judge Frank M. Coffin, on behalf of the Judicial Council of the First Circuit, to Senator Kennedy, in which letter the Judicial Council strongly endorses S-346.

It is possible that one or two additional pieces of evidence may become available to me between now and November 13 and, if so, I would request the opportunity to present them although not referred to in this letter.

Sincerely,

ANDREW A. CAFFREY.

EXHIBIT VII
UNITED STATES DISTRICT COURT.
Boston, Mass., September 16, 1975.

Hon. EDWARD M. KENNEDY,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR TED: Confirming our telephone conversation of last Thursday, September 11, 1975. I wish to advise that on June 23, 1975 Senator Burdick introduced a Bill captioned S. 346. I have been advised by a member of Senator Burdick's staff that this Bill was instigated by my testimony before Senator Burdick's subcommittee on February 2, 1973 and certain correspondence between Mr. Westphal of the Senator's staff and myself dealing with the inundation of the Massachusetts docket by trivial freight damage cases.

The thrust of Senator Burdick's S. 346 would be to amend 28 U.S.C. § 1337 so as to insert therein a jurisdictional minimum requirement that the bill of lading for the shipment involved in the case exceed $10,000 exclusive of interest and costs.

To illustrate the very small dollar amounts involved in the settlement of cases presently being filed in this court, in the absence of such a jurisdictional requirement, I enclose herewith an analysis of settlements made in about 200 of these cases assigned to me, which analysis shows the dollar amount involved in each case is trivial when compared to the cost of processing a case in a Federal District Court.

The presence of these cases, which, as of September 1, 1975 totalled 6,898 cases pending in this court, is having a very deleterious effect on the currency of our civil docket as was noted in the Annual Report of the Director of the Administrative Office of the United States Courts. (Page XI-57 of the Report for fiscal year 1975.) Mr. Kirks stated:

> "The case flow of I.C.C. cases in the district courts continue to show that six out of ten of them are filed, terminated or pending in only one district court, Massachusetts. Stated another way, in the other 93 district courts, on a percentage basis I.C.C. cases comprise about a half of a percent of the workload. These statistics illustrate how in a single district a specialized caseload envelopes the entire court, thereby affecting its overall procedures in disposing of the civil caseload. It is therefore, no surprise that this district has the highest per judgeship pending civil caseload among the 94 courts, 1737 compared to 278 for the 93 other district courts."

In our conversation you indicated that you would be amenable to using your good offices, with Senator Burdick's committee, in bringing this Bill on for a hearing and hopefully moving it on to enactment. Such enactment would substantially eliminate use of this court for trivial cases and send them back to the state courts which are being used in all other parts of the United States for such litigation.

As a further point of interest, Mr. Kirks states, on page XI-125, that Massachusetts "accounts for approximately 83% of the national total for this nature of suit. These cases receive a weight of .57 and seldom require court action."

In his letter to me of February 20, 1975, Senator Burdick asked me to make myself available to testify at the hearing on S. 346 and expressed the opinion that the hearing would be held early in the spring of 1975. Despite the fact that this timetable has been delayed by more pressing matters, I wish to advise that I am available to testify in support of this Bill as is the Clerk of our Court.

If I or any member of the staff of this court can be of any assistance to you or any member of your staff, please do not hesitate to call.

Thank you for your cooperation in this matter.

ANDREW A. CAFFREY,
Chief Judge.

EXHIBIT VII

UNITED STATES COURT OF APPEALS,
FOR THE FIRST CIRCUIT.
Portland, Maine, October 14, 1975.

Hon. EDWARD M. KENNEDY.
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: I write on behalf of the Judicial Court of our Circuit to endorse Chief Judge Caffrey's request contained in his letter to you of September 16, 1975, to support S. 346. As his letter explains in more detail, this bill would eliminate from federal jurisdiction an oppressive quantity of small freight damage claims from the docket of the Massachusetts district court. The removal of these cases would not only ease the flow of paper work in the clerk's office and, to some extent, relieve judges of the almost ministerial tasks of processing settlement agreements, but would remove from controversy the presence of such cases in the statistics of the Massachusetts court.

Each member of the Council has read Judge Caffrey's letter and wishes to be recorded as enthusiastically approving it.

FRANK M. COFFIN,
Chief Judge.

Senator SCOTT. Judge Caffrey?

Judge CAFFREY. The American Law Institute could not possibly have known about this situation because it did not develop until after 1969. Second, I would like to make the point that Mr. Infelise has expressed the great expertise of my colleagues and myself in matters Federal and as Mr. Westphal has pretty well brought out, you settle 1,000 out of 1,002 cases, there is not much expertise called upon.

These cases do not involve sophisticated or difficult legal ruling by any judge of our court. So I say that the claimants do not need Federal judge expertise. The judges of the State courts today are much more conversant with Federal law due to the recent changes in the legal operation so that these cases are perfectly adequate for State courts and they are in State courts in all the other 49 States, which puts to rest any question that this type litigation cannot be handled by State courts.

With regard to getting these cases tried, they just are not tried and they are not about to be tried.

With regard to the meat grinder operation Mr. Westphal mentioned, that would temporarily give some relief but these cases are being filed five a day, 25 a week, at least 1,200 a year, so they would be back in a very short time.

On the cost to the United States, the change from the document I filed to the one he handed me this morning reflects the 5-percent pay increase.

Mr. Infelise has referred to Judge Caffrey's problem. The problem is not Judge Caffrey's. It is the problem of the people who would like to have the judges of the Federal court involved in other litigation.

It is not personal to me. The impact of the criminal docket has kept the youngest and most vigorous of our six judges trying nothing but criminal cases all year. This type case is not going to be the subject matter of any Federal judicial expertise even if it were necessary which I submit it is not.

With regard to the fact, there may be some cases where it needs a ruling, a significant case could be procesed for a ruling, but the mass produced things would be just as well off on the State side of the slate.

Senator SCOTT. Thank you, gentlemen. This will conclude the hearings. We will adjourn the hearings but should there be something else you would like to submit for the record, feel free to do so.

[Whereupon, at 11:05 a.m., the subcommittee adjourned subject to call of the Chair.]

UNITED STATES DISTRICT COURT

LOCAL RULES

RULE 41.1 DISMISSAL FOR WANT OF PROSECUTION

(a)(1) Whenever in any civil action the clerk shall ascertain that no proceeding has been docketed therein for a period of ONE (1) year, he shall then mail notice to all persons who have entered an appearance in such a case that, subject to the provisions of subsection (a)(3), the case will be dismissed without further notice thirty (30) days after the sending of the notice.

(2) After the thirtieth day following the sending of the notice, without order of the court the clerk shall, subject to the provisions of subsection (a)(3), enter an order of dismissal for all cases on the list. It shall not be necessary for the clerk to send additional notice of the dismissal to any counsel or party.

(3) A case shall not be dismissed for lack of prosecution if within thirty (30) days of the sending of notice an explanation for the lack of proceedings is filed and the judge to whom the case is assigned orders that it not be dismissed.

(b)(1) Additionally, each judge may from time to time give notice of not less than twenty (20) business days of hearing on a dismissal calendar for actions or proceedings assigned to that judge that appear not to have been diligently prosecuted. Unless otherwise ordered by the assigned judge, each party shall, not less than ten (10) business days prior to the noticed hearing date, serve and file a certificate describing the status of the action or proceeding and showing that good cause exists for the court to retain the case on the docket. Nothing in this rule precludes the filing of a motion for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

(2) Failure on the part of the plaintiff to file the required statement or his failure to appear at the scheduled hearing shall be grounds for the dismissal of the action.

(c) The dismissal of a case pursuant to this rule shall not operate as an adjudication on the merits unless the court on motion of a party directs otherwise.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases

Various Railroad-Defendants,
Defendants.

AFFIDAVIT OF JOHN M. CATALDO

I, John M. Cataldo, being duly sworn depose and state:

1. I have been proprietor of National Freight Traffic Service since 1945. In this capacity I have filed claims on behalf of the named Plaintiff-Receivers in the pending freight damage cases.

2. At the time of the filing of the freight loss and damage claims which ultimately became the subject matters of the cases pending before this Court, the defendants were common carriers subject to regulation by Federal Statutes, and by the decrees of the Interstate Commerce Commission. Accordingly, the defendant railroads were mandated to compile all pertinent data with respect to the transportation of perishable shipments and they were compelled to convey this information to the claimant upon presentation of a freight loss and damage claim. This exchange of pertinent documents was faithfully carried out by the defendant carriers and it obviated the need on the part of the plaintiffs to seek additional discovery upon the commencement of litigation. This federally mandated investigative requirement, plus the sheer number of freight damage

cases filed in this Court, prompted deviations from the normal procedures utilized to prosecute the average lawsuit. Since 1965, over 20,000 lawsuits involving freight loss and damage claims have been processed in this Court. This enormous volume of cases created the imperative for the Defendants, the Plaintiffs, and even the Court to forgo the usual methods for the prosecution of the cases.

3. In the late 1960's, approximately fifteen freight damage cases were tried and judgments entered in the U.S. District Court in Massachusetts, establishing the law on various contested points. Under pressure of the Court, settlement conferences were then held. A District Judge would give trial lists to the parties and tell them to confer and come back with status reports. For years thereafter, freight damage cases were settled voluntarily by the parties on the basis of the decided law without the need for additional trials. The railroads insisted, however, that damage claims become lawsuits first because railroad Freight Claim Rules required that stipulated settlements be entered as court judgments in order to allow paying carriers to seek reimbursement from participating railroads. This insistence upon court judgments by the railroads was directly responsible for the avalanche of lawsuits which inundated this Court.

4. Although in a few instances interrogatories and answers to interrogatories were filed subsequent to the resolutions of the questions of freight damage law, it was the consistent practice of all the parties that, except for the entry of judgment, the freight damage cases would be settled or dismissed without docket activity irrespective of the length of time a case was on the docket.

5. Thus, since 1968 thousands of freight loss and damage cases have been resolved in this Court without the need for unnecessary discovery procedures. Had the Plaintiffs undertaken additional motions in this Court for discovery and for the

production of documents previously submitted to them by the defendants, such actions would have been deemed by the railroads as unwarranted harassment. Yet, aside from the final judgment, which was predicated upon agreed statements of facts, no activity of any kind was recorded on the docket. The fact that all unresolved cases remained on the active docket compelled continual activity in the prosecution of the cases, which resulted in the settlement of thousands upon thousands of cases.

6. The filing of the *Blanchette* case, however, produced a dramatic interruption of the smooth functioning of the settlement procedures developed over many years between the railroad Defendants and the Receiver-Plaintiffs. The *Blanchette* case, according to Penn Central attorney John Hally, was specifically intended to cause such disruption and to bring about wholesale dismissal of all pending suits. It must be noted, however, that this case involved extensive discovery procedures which led to the production of millions of documents, including thousands from the pending cases. This, in itself, constituted an intense form of "prosecution of the cases."

Subsequent to the filing of *Blanchette*, the Southern Pacific Railroad, in a further effort to forestall the continuing out-of-court settlements, introduced a "Motion for a Moratorium" on such settlements. Defendant's Memorandum in response to Court Order of July 17, 1991, makes reference to this Motion and states that "Attorney Frank Infelise . . . opposed the request (for a Moratorium) on the basis . . . that the commencement of the (*Blanchette*) litigation should not disrupt the judicial processes of this Court." The Memorandum continues, "During the entire pendance of *Blanchette* (from September 1978 until February 20, 1987 . . . the Receiver-Plaintiffs did nothing to prosecute the Law Suits." The stated objective to be attained by Attorney Infelise in his opposition to the Moratorium was to continue the out-of-court settlements strongly favored by

some railroads and vehemently opposed by other railroads. Unfortunately, even though the Motion for a Moratorium was denied by the Court, a former Counsel to Penn Central Railroad made it clear to those railroads in favor of continuing the settlement process in existence before *Blanchette*, that the Penn Central would, henceforth, refuse to reimburse participating railroads for Penn Central's proportion of any claim settlements. Subsequent to this action all railroads, without exception, ceased to participate with the Plaintiff-Receivers in any out-of-court settlements. In short, the Penn Central Railroad and the Southern Pacific Company attained *de facto* what they failed to attain *de jure*.

Even during the pendance of *Blanchette*, and subsequent to the administrative closing of the cases, continual conversations and meetings occurred between Plaintiffs' attorneys and the legal representatives of many of the defendant railroads. These exchanges constituted repeated attempts to importune the defendants to resume the practices of settlement extent prior to *Blanchette*. As a result of this continual dialogue, upon final adjudication of *Blanchette*, the Union Pacific, Western Pacific, Missouri Pacific, and Seaboard Coastline Railroads settled all pending cases out-of-court. True to its promise, the Penn Central Railroad refused to reimburse those railroads for their just apportionment under appropriate Freight Claim Rules, so much so that the Seaboard Coastline Railroad commenced litigation against the Penn Central in an effort to recover that which they believe is justly due them.

Subsequent to *Blanchette*, and to the filing of 3000 individual motions to restore the pending cases to the active docket, Judge Tauro ordered all parties to negotiate settlement of all claims. To this end, Plaintiffs' representatives journeyed to California on two separate occasions to conference claims over a span of ten days with the Southern Pacific Railroad. The Southern Pacific representatives, in turn, visited Boston on at least three

occasions to discuss settlements. Similarly, several conferences were held with the Santa Fe and Penn Central Railroads. This activity was in addition to the items listed in the "Summary of Litigations Activity."

7. In Defendant's Memorandum in response to Court Order of July 17, 1991, it is alleged that prejudice would result to the defendants inasmuch as "many of the documents relating to the more than 2,200 shipments involved in the Lawsuits have, in many cases, been inadvertenly lost or destroyed." As previously explained, the defendant railroads, in compliance with Federal Regulations, have previously conveyed to the Plaintiff-Receivers all pertinent documents which resulted from their investigation of the freight loss and damage claims, and the Plaintiffs would be happy to return copies of Defendants' own documents should they have been lost or destroyed.

8. The second way in which the Railroads allege that prejudice would result relates to the defendants' professed reliance for the defense of the cases upon "oral testimony of lay witnesses whose availability and ability to remember events which occurred anywhere from 15 to 20 years ago is unlikely." Throughout the years, cases have been tried principally in the Boston Federal District Court. Virtually all of the cases previously tried covered trans-continental shipments transported by many different railroads over a span of 3000 miles. Not one witness who testified on behalf of the defendant railroads was an "eye-witness" to any segment of the movement, either at origin, in transit, or at destination. Before deregulation, the railroads were transporting tens of thousands of cars of fruits and vegetables, and thus the probability of finding an employee who had an independent recollection of any specific rail shipment was highly unlikely. Furthermore, each of the pending claims alleges some specific act of railroad negligence such as delay, refrigeration failure, or bruising resulting from rough handling in transit. In rail shipments of 3000 miles, it is vir-

tually impossible to become an eye-witness to unpredictable delays which cause the missing of a vital connection, or to the fact that the refrigeration did *not* malfunction in transit, but was on a defrost cycle, or that a freight car was *not* bumped at a speed in excess of the allowable limit to cause extensive bruising. Even in those instances where a railroad representative personally inspected the merchandise at its final destination, the railroads presented as a witness their Chief Inspector who had not seen the shipment in preference to the individual who physically performed the inspection.

9. Accordingly, in the past, those called upon by the railroads to help defend their cases were "expert" witnesses who drew conclusions from business records and not from a recall memory. Thus, the time span between the date of shipment and the trial of the case, be it 1 or 10 or even 20 years, was rendered totally irrelevant in the prosecution of the cases. Hence, the burden should be placed upon the railroads to identify the individuals who were eye-witnesses to the shipment and who are now handicapped because of the passage of time.

10. Were it to develop that the railroads could produce such eye-witnesses, each case should be handled on a case-by-case basis. Justice would hardly be served by the dismissal of 2200 cases because a few aberrations might present themselves.

11. As previously noted, the de facto Moratorium on settlements which resulted from *Blanchette*, provoked the administrative closing of 2200 cases, thereby delaying their settlement for twelve long years. Yet, only nine Receiver-Plaintiffs were party to the *Blanchette* case. There are an additional twenty-nine Receiver-Plaintiffs not included by the railroads as defendants in *Blanchette* who have become innocent victims by virtue of the administrative closing of their pending lawsuits. This injustice would be severely compounded by the dismissal of cases which would have been resolved on their merits years ago had they been allowed to remain on the active docket.

12. It has become my firm conviction, unfortunately, that the cooperative spirit which permeated the pre-trial conferences before *Blanchette* has been supplanted within the ranks of the few remaining defendants by the expectation that the pending cases will either be dismissed on technical grounds, or remain administratively closed, a state of limbo which will provide neither the legal nor financial incentives for the cases to be resolved on their merits. Plaintiffs, in good faith, have attempted every prudent remedy known to them to diligently prosecute cases which have been administratively closed. The fact that, thus far, these efforts have not been successful, ought not be interpreted as a lack of effort, willingness or eagerness to diligently prosecute the cases. Recent history suggests that these cases will not be resolved until they are restored to the active docket. This action of restoration will remove the shackles of the administrative closings from the hands of the plaintiffs. Only then will it be apparent to all that the plaintiffs stand ready to prosecute these cases with as much diligence as is required, a position which the plaintiffs have held since the date of each individual filing.

Signed this 20 day of September, 1991, under the pains and penalties of perjury.

/s/ _____

John M. Cataldo

SLIP PAGE 50

(2)

Supreme Court, U.S.
FILED
JUL 20 1992
OF THE CLERK

No. 91-1845

In the Supreme Court of the United States

OCTOBER TERM, 1991

VARIOUS RECEIVER-PLAINTIFFS,
PETITIONERS,
v.
VARIOUS RAILROAD-DEFENDANTS,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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No. 91-1845

In the Supreme Court of the United States

OCTOBER TERM, 1991

VARIOUS RECEIVER-PLAINTIFFS,
PETITIONERS,

v.

VARIOUS RAILROAD-DEFENDANTS,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Summary of Opposition.

Supreme Court Rule 10 sets forth the "special and important reasons" upon which this Court will grant a writ of certiorari. None of those grounds exist here. Petitioners here simply ask this Court to review the First Circuit Court of Appeals' order upholding the United States District Court for the District of Massachusetts' decision to dismiss certain cases for lack of prosecution. The decision in issue here is not in conflict with the decision of another Court of Appeals. (Supreme Court Rule 10(1)(a)). It does not involve a federal question. (Supreme Court Rule 10(1)(a) and (c)). Nor is it "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Supreme Court Rule 10(1)(a)). Having failed to set forth any reason why this Court should grant Petitioners' writ, the writ must be denied.

Procedural History.[1]

The matters before the District Court consisted of approximately 1,700 civil lawsuits (the "lawsuits" or "cases"), which involved in excess of 2,200 individual freight damage claims. These lawsuits were commenced pursuant to the provisions of the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707, formerly 49 U.S.C. § 20(11) in the United States District Court for the District of Massachusetts by various Petitioners between 1971 and 1978. The lawsuits alleged that damages were sustained in the course of interstate transportation of shipments to the Boston area of various types of produce such as lettuce, tomatoes, celery and other perishable commodities. Those shipments occurred between approximately 1969, or earlier, and 1976. In each case, the produce was transported by one or more of the Respondents and delivered to one of the Petitioners.

On September 8, 1978, the claims practices which gave rise to the lawsuits were challenged by The Penn Central Corporation ("Penn Central") in an action filed in the United States District Court for the District of Massachusetts entitled, *Blanchette, et al., Trustees of the Penn Central Transportation Company v. John M. Cataldo, et al.*, Civil Action No. 78-236-S ("Blanchette"), in which John M. Cataldo, the claims agent responsible for filing the thousand of lawsuits, and nine of the largest Boston receivers, Community-Suffolk, Inc., Peter Condakes Company, Inc., P. Tavilla Co., Inc., Paramount Produce, Inc., Mutual Produce, Inc., A. Cavallaro Co., Inc., Big T Sales, Inc., Arthur G. Silk, Inc. and DiMare Brothers, Inc., were named as defendants.

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[1] The facts set forth in Petitioners' memorandum are misleading and, in many instances, inaccurate. The actual procedure history of these cases as found by the District Court on October 7, 1991, is set forth below. (*See also* District Court Memorandum dated October 7, 1991, fn 2, Petitioners' Appendix, A3-A4).

At the commencement of *Blanchette*, the District Court, Caffrey, J., was requested by one of the railroad defendants to stay proceedings in the lawsuits pending resolution of the issues raised in the *Blanchette* litigation. Attorney Frank Infelise ("Attorney Infelise") on behalf of the various Petitioners opposed the moratorium request on the basis, *inter alia*, that:

> The commencement of the [*Blanchette*] litigation in question should not disrupt the judicial processes of this Court. . .

Plaintiffs' Memorandum in Opposition to Motion of Defendant for a Moratorium, dated November 20, 1978, par. 5. (App. 1-4). The request for a moratorium was denied by the District Court.

During the entire pendency of *Blanchette* (from September 1978, when *Blanchette* was commenced, until February 20, 1987, the date on which the final order was issued) and despite the court's denial of the moratorium sought by the railroads, the Petitioners did nothing to prosecute the lawsuits.

In 1980, the Clerk of the District Court administratively closed the lawsuits for lack of activity over a twelve-month period, thereby removing them from the Court's active docket. Thereafter, the clerk sent the files to off-site storage.

Petitioners took no action to prosecute the lawsuits following the administrative closure in 1980 until December 21, 1987, when Petitioners filed a motion with the District Court (Tauro, J.) seeking to remove the administrative closure orders on the lawsuits, and filing "List of Cases Subject to Motion to Bring Forward for Further Proceedings" ("Motion to Bring For-

ward").[2] Temporary Master Docket, MD 76 (App. 12). On February 5, 1988, the District Court denied Petitioners' Motion to Bring Forward.[3] Temporary Master Docket, MD 88 (App. 13).

On February 16, 1988, Petitioners filed Motion to Reconsider order of February 5, 1988 ("Motion to Reconsider"). Temporary Master Docket, MD 90 (App. 14). On February 23, 1988, the District Court denied Petitioners' Motion for Reconsideration. Temporary Master Docket, MD (date 2/23/88) (App. 14).

Petitioners did not appeal the District Court's orders of February 5 and February 23, 1988 and, as a result, those orders became final and binding.

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[2] Although initially assigned to various District Court Judges, the cases were consolidated for administrative purposes before the Honorable Judge Joseph Tauro in 1987. Upon the invitation of the District Court, each of the defendants moved to dismiss the lawsuits at the times indicated below:

> Florida East Coast Railway Company moved to dismiss on November 4 and 10, 1987. Temporary Master Docket, MD 17, 18 and 22 (App. 7).
>
> Southern Pacific Transportation Company, Holton Inter-Urban Railway Co., Santa Maria Valley Railroad Company, Stockton Terminal & Eastern Railroad, San Diego & Arizona Eastern Railway Co., Sunset Railway Co. and Northwestern Pacific Railway Co. moved to dismiss on November 30, 1987. Temporary Master Docket, MD 25 (App. 7).
>
> The Penn Central Corporation moved to dismiss on December 8, 1987. Temporary Master Docket, MD 66 (App. 11).
>
> The Atchinson, Topeka and Santa Fe Railway Company, Sunset Railway Company and Stockton Terminal and Eastern Railroad moved to dismiss on January 4, 1988. Temporary Master Docket, MD 84 (App. 13).
>
> The Consolidated Rail Corporation moved to dismiss on April 4; 1989. Master Docket, MD 4 (App. 15).
>
> Burlington Northern Railroad moved to dismiss on May 5, 1989. Master Docket, MD 38 (App. 18).

[3] Respondents motions to dismiss were thus rendered moot by virtue of the Court's action refusing to revive these cases and, therefore, were not acted upon at that time.

Over one year later, on April 4, 1989, Petitioners filed individual "Motions to Restore to Active Docket" in each of the 1,700 administratively closed cases which the District Court had refused to restore in 1988 ("Motions to Restore"). Master Docket, MD 1 (App. 15). On July 27, 1989, the District Court denied Petitioners' motions to "restore" on the ground that Petitioners "are bound by this court's February 1988 orders." Master Docket, MD 36 and 37 (App. 18).

On August 24, 1989, Petitioners appealed the District Court's July 27 Order, but on November 15, 1989 moved that the appeal be voluntarily dismissed. Master Docket, MD 45 (App. 18); General Docket (Case No. 891928), entry dated 11/17/89 (App. 25). On December 1, 1989, the First Circuit Court of Appeals dismissed Petitioners' appeal. General Docket (Case No. 891928), entry dated 12/1/89 (App. 26).

On March 19, 1990, over seven months after the District Court had issued its last order disposing of these cases, Petitioners filed individual motions for summary judgment in five of the lawsuits ("Motions for Summary Judgment"). Master Docket, MD 48, 51, 54, 57 and 60 (App. 19-20). On September 10, 1990, the District Court denied the Motions for Summary Judgment on the ground that "the pending motions are essentially motions to reconsider and vacate this court's prior order [which] this court declines to do." Master Docket, MD 82 (App. 22).

On September 26, 1990, Petitioners appealed the District Court's denial of the five summary judgment motions to the First Circuit Court of Appeals. Master Docket, MD 83 (App. 22). On January 3, 1991, the First Circuit Court of Appeals unanimously dismissed Petitioners' appeal, finding:

> neither error nor abuse of discretion in (1) the district court's interpretation of the most recent motions for summary judgment to be nothing more than essen-

> tially repetitive motions to reconsider and vacate its prior orders and (2) its declination to do so. And, the underlying cases, being stale, were properly dismissible for want of prosecution, in any event.

General Docket (Case No. 901963), entry dated 1/3/91 (App. 28 and 33).

Virtually ignoring the repeated orders listed above and in an obvious effort to end-run Judge Tauro, in June 1991, Petitioners filed with Judge Freedman in Springfield, Massachusetts (before whom the cases were no longer pending, having been consolidated before Judge Tauro in 1987) "Plaintiff-Receivers' Motion for Determination of Status of Cases." (App. 34). Upon the initiative of Judge Freedman, Petitioners' motion was transferred to Judge Tauro who, on July 17, 1991, ordered the parties to "file a certificate" and "appear at a hearing . . . to show good cause why these actions should not be dismissed for want of prosecution." (App. 36).

Based on the "prolonged period of unjustifiable inactivity," and the "prejudice to defendants" of being forced to try cases dating back 15 to 20 years, the District Court, on October 7, 1991, dismissed the cases with prejudice finding that:

> Plaintiffs have failed to identify any good reason either in their Certificate or at the September 27, 1991, hearing which would justify the nine-year delay in prosecution of these cases . . . . Moreover, so long a delay has substantially prejudiced the defendants, as witnesses' memories have faded and physical evidence has disappeared . . . . Indeed, the Court of Appeals for the First Circuit has already upheld the dismissal of these lawsuits, noting that the 'underlying cases, being stale, were properly dismissable for want of prosecution'. . . .

Master Docket, MD 1 and 2 (App. 23).[4]

On November 22, 1991, Petitioners appealed the District Court's October 7 Order to the First Circuit Court of Appeals. Master Docket, MD 3 (App. 23). Respondents filed a motion to dismiss the appeal on the ground that "no substantial question exist[ed]." General Docket (Case No. 912188), entry dated 11/27/91 (App. 30). On February 21, 1992, after Petitioners had already filed their appellate brief, the First Circuit Court of Appeals unanimously affirmed the District Court's order holding that:

> [w]e have considered the motion to dismiss and the opposition thereto, including appellants' brief, and the record on appeal. We agree with appellees' contention that no substantial question is present and affirm essentially for the reasons stated in the district court's memorandum of October 7, 1991.

General Docket (Case No. 912188), entry dated 2/21/92 (App. 31).

In summary, from the inception of these cases at various times between 1971 and 1978, through December, 1987, some nine to sixteen years later, Petitioners took no action at all to prosecute these cases. In December 1987, Petitioners filed a motion to bring the cases forward from administrative closure. The motion was denied by the District Court in early 1988 and no appeal was taken. Since 1988, Petitioners have filed three more motions and three appeals, all seeking the same relief denied in 1988 — to revive the cases. Each time the District Court and the Appeals Court denied Petitioners' motion. Finally, to prevent the abusive motion practice embarked on by Petitioners, the District Court, on July 17, 1991, ordered Petitioners to file a memorandum as to why the cases should not

[4] For the full text of the District Court's Opinion, see Petitioners' Appendix, A3-A5.

be dismissed. Petitioners failed to state any reason and on October 7, 1991, the District Court issued an order dismissing the cases based on Petitioners failure to prosecute and the prejudice to Respondents by Petitioners' delay. The First Circuit Court of Appeals reviewed all arguments forwarded by Petitioners and upheld the District Court's order dismissing the cases.

Reasons for Denying the Writ.

I. The District Court's Dismissal of the Lawsuits, Which Was Affirmed by the First Circuit Court of Appeals, Was Appropriate and Was Not an Abuse of the Court's Discretion.

The authority of a federal trial court to dismiss an action with prejudice for failure to prosecute is well established. *See e.g., Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). Such a dismissal is discretionary and will be reversed only upon a showing of an abuse of discretion. *Corchado v. Puerto Rico Marine Management, Inc.*, 665 F.2d 410, 413 (1st Cir. 1981), *cert. denied*, 459 U.S. 826 (1982); *Richmond v. General Motors Corporation*, 437 F.2d 196, 199 (1st Cir. 1971); *Food Basket, Inc. v. Albertson's, Inc.*, 416 F.2d 937, 939 (10th Cir. 1969).

The First Circuit has upheld the District Court's authority to dismiss civil actions in substantially less egregious circumstances than those present here. *See, e.g., Colokathis v. Wentworth-Douglass Hospital*, 693 F.2d 7 (1st Cir. 1982), *cert. denied*, 461 U.S. 915 (1983), *rehearing denied*, 462 U.S. 1146 (1983) ("four and a half years" delay long enough

to invoke the sanction of dismissal for failure to prosecute). Petitioners failure to take any action in these cases for at least nine years, and in some cases as many as sixteen years, constitutes more than sufficient grounds for dismissal.[5] *See, e.g., Bendix Aviation Corp. v. Glass*, 32 F.R.D. 375, 377 (E.D. Pa. 1962), *aff'd*, 314 F.2d 944 (3d Cir. 1963), *cert. denied*, 375 U.S. 817 (1963) (plaintiff has failed to prosecute when plaintiff does nothing, knowing that until something is done there will be no trial). Dismissal was well supported by the record and was within the sound discretion of the District Court, all as found by the First Circuit Court of Appeals in affirming the District Court's actions.

II. The Issues Raised By Petitioners Do Not Merit Review By This Court.

The well established standard by which this Court exercises its discretionary power of review upon a writ of certiorari is embodied in Rule 10 of the Supreme Court Rules. That Rule requires that "a petition for a writ of certiorari will be granted only when there are special and important reasons therefor."[6] Since the issues raised by Petitioners in their application for a writ of certiorari are neither "special" nor "important," certiorari must be denied.

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[5] What Petitioners describe as their alleged "repeated efforts" to prosecute these cases is nothing more than the series of repetitive and abusive motions seeking to restore these cases filed since the District Court's initial orders in 1988. These motions were properly denied by the District Court and the denials properly upheld by the First Circuit Court of Appeals.

[6] The Rule lists those reasons that meet these qualifications: (i) a Court of Appeals decision in conflict with the decision of another Court of Appeals; (ii) decisions involving a federal question; and (iii) decisions "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10(1).

The issues raised by Petitioners are narrowly focused on how their individual interests are affected by the District Court's Order dismissing their lawsuits. Petitioners do not allege widespread confusion over the meaning of the automatic re-opening provision of Rule III(H) of the Administrative Office of the Judicial Conference of the United States,[7] nor do they allege a repetitive practice by the District Court in erroneously invoking Local Rule 41.1(b). Rather, Petitioners allege that the District Court abused its discretionary power in this single action. Such allegations do not merit the attention of this Court which "does not sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (holding that writ of certiorari was improvidently granted). The requirement of "special and important reasons" for invoking Supreme Court review "impl[ies] a reach to a problem beyond the academic and episodic." *Id.* Given this Court's "capacity to decide only a small fraction of cases on the merits," this Court "must grant certiorari only in those cases that will enable [it] to resolve particularly important questions. *Yee v. City of Escondido, Cal.*, -- U.S. -- 112 S.Ct. 1522 (April 1, 1992). Clearly, the narrow issues raised by Petitioners, which relate solely to their particular litigation, do not merit review by this Court.[8] The District Court soundly exercised its discretionary power to dismiss cases which Petitioners had failed to prosecute for more than nine years and the Court of Appeals correctly upheld this authority. These actions are not "so far departed from the accepted and usual

[7] Indeed, Petitioners did not even invoke this part of the Rule, choosing instead to file a motion to bring the cases forward.

[8] The Supreme Court has routinely denied certiorari to virtually all cases involving Rule 41 dismissals for failure to prosecute. *See, e.g., Sheaffer v. Warehouse Employees Union, Local No. 730*, 408 F.2d 204 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 934 (1969); *Ramsay v. Bailey*, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977); *Alexander v. Pacific Martime Assoc.*, 434 F.2d 281 (9th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971).

course of judicial proceedings, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10(1)(a).

Conclusion.

For the foregoing reasons, Respondents' state that the order of dismissal was within the sound discretion of the District Court and that no issue is presented which requires review by this Court. Respondents therefore submit that Petitioners' Writ of Certiorari be denied.

Respectfully submitted,

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Appendix.

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Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VARIOUS PLAINTIFFS	)	
	)	
v.	)	ALL CASES PENDING UNDER
	)	49 USC SECTION 20(11)
SOUTHERN PACIFIC	)	BEFORE JUDGE CAFFREY
TRANSPORTATION	)	
COMPANY, Defendant	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION OF THE DEFENDANT FOR A MORATORIUM AS TO THE COURT'S ORDER

The various Plaintiffs, in support of their opposition to Defendant, Southern Pacific Transportation Company's Motion for a Moratorium as to the Court's Order, set forth the following grounds:

1. For some time prior to the commencement of Civil Action No. 78-2368-S, the Southern Pacific Transportation Company, together with all other defendant carriers, except for Penn Central Transportation Company, in accordance with the spirit and intent of the Court's Order, participated in meaningful negotiations, and as a result of the good faith efforts and willingness of all parties to "sit down" and exchange, discuss and confer on the merits of each individual case, several hundred cases were settled.

2. The participants to such negotiations included attorneys freight claim personnel, and various other railroad representatives all of whom have had many years of experience and expertise in freight loss and damage litigation and are fully

capable of evaluating the weight and credibility of the documentation and ascertaining whether "the underlying documents such as accounts of sale and inspection reports were either totally or partially fraudulent and/or false".

3. The Plaintiffs submit that the Southern Pacific Transportation Company by this motion seeks to obtain substantially the same relief sought by the Trustees of the Penn Central Transportation Company in Case No. 78-2368-S without a hearing on such action, without being a named party to such action, without a motion to join as a party to such action, and without any affirmative legal action or manifestation of its intent or willingness to adopt and accept the allegations of the Trustees of the Penn Central Transportation Company as set forth in said Complaint.

4. The Plaintiffs suggest that this Motion is a circuitous attempt by the Southern Pacific Transportation Company to seek legal redress without legal participation and to avoid what has heretofore been its custom and practice of investigating, conferring, negotiating, and evaluating the cases in which the Southern Pacific Transportation Company is the named defendant on a *Quid Pro Quo* basis.

5. The commencement of the litigation in question should not disrupt the judicial processes of this Court or prevent the Defendant from its own determinative evaluation of the merits of each case or serve as a bar or estoppel to the timely resolution of many of these cases.

6. This Defendant or any defendant carrier should not be permitted the largesse of treating loss and damage cases *en masse* and thereby cast aside and destroy the individuality of the facts, the documents, and the parties in each of these cases upon the mere presentation of a Complaint by the Trustees of the Penn Central Transportation Company in the eleventh hour of their stewardship (on October 24, 1978 the Trustees were relieved of their duties) containing, we submit, untenable,

generalized, and conclusory allegations of which the said Trustees had no "personal knowledge or documents in their possession which relate to the factual support for the litigation". (See copy of the Affidavit of Bernard G. Heinzen, attached hereto and marked "A".)

7. In addition, it would appear from the unconcluded deposition of Bernard G. Heinzen that many of the allegations of the Trustees of the Penn Central Transportation Company were for the most part reflective of Mr. Heinzen's guesses, feelings, and suspicions of judgment. It should be noted that at the time this Motion was filed, the Sourthern Pacific Transportation Company was probably unaware of the above matters, and, therefore, in addition to the said Affidavit, we are furnishing counsel for the Southern Pacific Transportation Company a copy of the transcript to-date of Mr. Heinzen's deposition.

CONCLUSION

The Plaintiffs submit that all parties hereto should be responsive to this Court's desire to dispose of the freight loss and damage cases by the continuance of their pre-Penn Central suit practice of conducting good faith negotiations. The imposition of a moratorium or stay order at this time would foreclose all future settlement discussions, would impair and prejudice the rights of the various receivers as party plaintiffs and as they are party defendants in the Penn Central suit, would impose an undue burden and hardship upon the plaintiffs, and, finally, such a moratorium would permit the unfair and advantageous usage by a non-party (Southern Pacific Transportation Company, and other defendant carriers) of an unsupported and unilateral action of another party (Penn Central Transportation Company).

The Plaintiffs request that this matter be set down for oral hearing. Approximate time, 20 minutes.

By their attorneys,
INFELISE & STROUT
Attorneys at Law, P.C.

BY:_____

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Appendix B.

TEMPORARY MASTER DOCKET
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
INTERSTATE FREIGHT DAMAGES CASES

1987		
Sept 10	MD 1	Letter to Clerk from Morris Goldings enclosing 200 Motions to Intervene for various freight claim cases.
	MD 2	Motion of Royal Packing Co to Intervene as a Party Plaintiff, filed
	MD 3	Adopted Complaint of Interveneing Plaintiff Royal Packing Co., (adopting co of Mutual Produce, Inc.)
	MD 4	Motion of John M. Catadlod d/b/a National Freight Traffic Service to Inter filed
	MD 5	Adopted Complaint of Intervening Plaintiff John M. Cataldo d/b/a National Freight Traffic Service (adopting complaint of Mutual Produce, Inc.)
	MD 6	Motion of Carol Joseph Maggio to Intervene as a Party Plaintiff, filed
	MD 7	Adopted Complaint of Intervening Plaintiff Carl Joseph Maggio ‹an individual successor to Joseph Maggio, Inc., Anthony Farms, Inc., Carl Joseph Maggio, and Magio, Inc.› (adopting complainto fo Mutual Produce, Inc.)
Sept 15	MD 8	Letter to Clerk form Nutter, McClennen & Fish, enclosing STIPULATION OF DISMISSAL for various cases from 72-2463-G to 78-2120-T (AS LIST IS EXTENSIVE SEE STIPULATION FOR INDIVIDUAL CASES NUMBERS).
Sept 16	MD10	Letter to Clerk from Mahoney, Hawkes & Goldings enclosing certificate of service for MD 1, MD 2, MD 3, MD 4, MD 5, MD 6 and MD 7.

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Sept 25	MD11	Opposition and Memorandum in Support of Opposition of PENN STATE CENTRAL CORPORATION to Inverten-tion Motions (#'d MD 2, MD 4, MD 6), filed
	MD12	Letter to Clerk from Nutter, McClennen & Fish Re: opposition to intervention motions stating that actions have been dismissed and that if the court hears motions to intervene, they request that depositions be taken if "the merits are considered relevant to the Court.
Oct 23	MD 13	TAURO, D.J.: COURT NOTES: REPORTER: CURRY› CONFERENCE, Mr. Goldings to memoranda on issue of whether the motion to intervene stays actions and other matters raised by the Court on or before 11/13/87. Mr. Chused and Mr. Gleason to file reply briefs on or before 11/30/87. Mr. Goldings to provide to counsel and Court a list of all cases with numbers in which he seeks to intervene. Within the next 3 weeks the parties are ordered to meet and confer with another seeing if these matters cannot be resolved along the lines suggested by the Further Conference scheduled for December 14, 1987 at 2:15 P.M. All parties who have filed motions to dismiss over the years and have never received action by the Court are to re-submit motions to Ms. Coughlin and will be acted on by Judge Tauro.
Oct 30	MD 14	Copy of Memo sent to all counsel by Morris Goldings proposing the date of 11/6/87 at 1:00 P.M. for meeting in an attempt to settle cases.
Nov 2	MD 15	Copy of Letter to Mr. Goldings from Wesley S. Chused in response to # MD 14. Mr. Chused is unavailable to meet on 11/6/87 but suggest that meeting be scheduled towards the end of November in an attempt to resolve matters.

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Nov 4 *	MD 16	Copy of Memo from Morris M. Goldings to all counsel suggesting date of 12/3/87 at 10:00 a.m. for meeting in an attempt to resolve matters.
Nov 10	MD 17	MOTION TO DISMISS of Deft FLORIDA EAST COAST RAILWAY COMPANY, filed c/s ‹COMMUNITY SUFFOLK, INC. v. FLORIDA EAST COAST RAILWAY C.A. 78-1078-F›
	MD 18	MOTION TO DISMISS OF DEFT FLORIDA EAST COAST RAILWAY COMPANY, filed c/s ‹BOSTON TOMATOR COMPANY v. FLORIDA EAST COAST RAILWAY COMAPNY C.A. 78-1165-F›
Nov 13	MD 19	Memorandum of Law in Support of Motions to Intervene (#'s MD 2, MD 4, MD 6), filed
	MD 20	Affidavit of Morris Goldings, Esquire Re: Memo to Lsw in Support of Motions to Intervene, filed c/s
Nov 23 *	MD 21	Objections of the deft, THE ARCHISON, TOPEKA & SANTA FE RAILWAY CO., To Motions To Intervene of JOHN CATALDO, CARL JOSEPH MAGGIO & ROYAL PACKING CO. FILED. cs.
Nov 4	MD 22	MOTION TO DISMISS OF DEFT FLORIDA EAST COAST RAILWAY COMPANY, filed c/a ‹BOSTON TOMATO COMPANY, INC. v. FLORIDA EAST COAST RAILWAY COMPANY C.A. 78-1102-S.
Nov 18	MD 23	P's memo in oppos to D's mtn to dismiss, filed c/s
Nov 23	MD 24	MOTION OF DEFT UNDER RULE 37(d) TO DISMISS, filed c/s. ‹RALPH DeMARCO d/b/a MARCO TOMATO CO., v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY
Nov 30	MD 25	DS' MOTION TO DISMISS UNDER RULE 41(b) and LR 19 filed, c/s. [24 Ps - Attached Exh. A. v. Southern Pacific Transpo. Co., et al.

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NOV 30	MD 26	D's Memo in Support of Their Motion to Dismiss Under Rule 41(b) of the FRCP and LR 19, filed, c/s. [24 Ps - Attached Exh. A v. Southern Pacivic Transpo. Co., et al.
NOV 30	MD 27	Affidavit of Counsel of Ds Southern Pacific Transpo. Co. Holton, et al in Support of Ds' Motion to Dismiss, filed, c/s [24 Ps - Attached Exh. A v. Southern Pacific Transp. Co. et al.
NOV 30	MD 28	Affidavit of Carol A. Harris in Support of D's Motion to Dismiss Under Rule 41(b) FRCP and LR 19, filed, c/s.
NOV 30	MD 29	Proposed - Order of Dismissal for Failure to Prosecute, filed, c/s. [24 Ps - Attached Exh. A v. Southern Pacific Transpo. Co., et al.
NOV 30	MD 30	Supplemental Memo of Ds Southern Pacific Transpo. Co., et al in Oppos. to Motions of Carl Joseph Maggio, Royal Packing Co., and John M. Cataldo, d/b/a National Freight Service to Intervene Under Rule 24(a)(2), filed, c/s. [Mutual Produce Inc., v. Southern Pacific et al.
DEC 1	MD 31	Notice of appearance of counsel for defendant Consolidated Raul Corp., filed by Helene Kazanjian, CA 78-1558-S.
DEC 1	MD 32	Notice of appearance of counsel for Pltf, Mutual Produce, Inc. filed by Alan L. Lewis, CA 78-1558-S.
DEC 1	MD 33	STIPULATION OF DISMISSAL by parties in CA 78-78-1558-S, filed. c/s. [Mutual Produce v. Consolidated Rail Corp.
DEC 1	MD 34	Notice of appearance of counsel for defendant Consolidated Rail Corp. by Helene Kazanjian, filed, /c.s [Mutual produce Inc. v. Consolidated 78-1929-S.
DEC 1	MD 35	Notice of appearance of counsel for pltf, Mutual Produce, Inc., filed by Alan L. Lewis, c/s. [Murual Produce v. Consolidated Rail, CA 78-1929-S.
DEC 1	MD 36	STIPULATION OF DISMISSAL by parties filed. [Mutual Produce v. Consolidated Rail Corp. CA 78-1929-S.

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DEC 1	MD 37	Notice of appearance of counsel for defendant Consolidated Rail Corp., by Helene Kazanjian, filed, c/s. [Mutual Produce v. Consolidated Rail, 78-1384-C.
DEC 1	MD 38	Notice of appearance of counsel for Plaintiff, Mutual Produce, Inc., filed by Alan L. Lewis, c/s. [CA 78-1384-C
DEC 1	MD 39	STIPULATION OF DISMISSAL by parties filed, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1384-C.
DEC 1	MD 40	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated, CA 78-1662-T.
DEC 1	MD 41	Notice of appearance of Counsel for pltf., Mutual Produce, Inc., filed by Alan L. Lewis, c/s.
DEC 1	MD 42	STIPULATION OF DISMSISSAL filed by parties, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1662-T.
DEC 1	MD 43	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1827-F.
DEC 1	MD 44	Notice of appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual produce, v. Consolidated, CA 78-1827-F.
DEC 1	MD 45	STIPULATION OF DISMISSAL filed by parties, c/s. [Mutual Produce v. Consolidated, CA 78-1827-F.
DEC 1	MD 46	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1268-S
DEC 1	MD 47	Notice of appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual produce v. Consolidated, CA 78-1268-S
DEC 1	MD 48	STIPULATION OF DISMISSAL filed by parties, c/s. [Mutual Produce v. Consolidated, CA 78-1268-S.
DEC 1	MD 49	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA78-2116-T.

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DEC 1	MD 50	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Alan L. Lewis [Mutual Produce v. Consolidated, 78-2166-T.
DEC 1	MD 51	STIPULATION OF DISMISSAL filed by parties, c/s. [Mutual Produce v. Consolidated, CA 78-78-1116-T.
DEC 1	MD 52	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1116-C.
DEC 1	MD 53	Notice of Appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual produce, v. Consolidated, CA 78-1116-C
DEC 1	MD 54	STIPULATION OF DISMISSAL filed by parties, c/s. [Mutual Produce v. Consolidated, CA 78-1116-C.
DEC 1	MD 55	Notice of Appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual produce, v. Consolidated, CA 78-1468-MA
DEC 1	MD 56	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 78-1468-MA
DEC 1	MD 57	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 776-T
DEC 1	MD 58	Notice of Appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual produce, v. Consolidated, CA 78-78-776-T
DEC 1	MD 59	STIPULATION OF DISMISSAL by parties filed, c/s. [Mutual Produce v. Consolidated, CA 78-78-776-T
DEC 1	MD 60	Notice of appearance of counsel for defendant Consolidated Rail Corp., filed by Helene Kazanjian, c/s. [Mutual Produce v. Consolidated Rail, CA 965-T.
DEC 1	MD 61	Notice of Appearance of counsel for plaintiff filed by Alan L. Lewis. [Mutual Produce, v. Consolidated, CA 78-965-T

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DEC 1	MD 62	STIPULATION OF DISMISSAL filed by parties, c/s. [Mutual Produce v. Consolidated, CA 78-965-T.
DEC 3	MD 63	P's Memo in Oppos. to D's Motion to Dismiss filed, c/s. [Boston Tomato Co. v. Florida East Coast, CA 78-1165-F.
DEC 3	MD 65	Reply memo in Support of Oppos. of the Penn Central Corp. to Intervention Motions, (Attached various Exh. A), filed, c/.s [Mutual Produce, v. Penn Central Corp.
DEC 8	MD 66	Motion to Dismiss, filed, c/s. [Various Ps (See attached Exh. A) v. The Penn Central Corp.
DEC 8	MD 67	Memo in Support of Penn Central's Motion to Dismiss for Failure to Prosecute filed, (See Exh. A attached). [Various Ps v. the Penn Central Corp.
DEC 8	MD 68	Affidavit of Raymond F. Glenn, Exh. A) attached, filed, c/s. [Various Ps v. The Penn Central Corp.
DEC 9	MD 69	Mtn for admission pro hac vice of HYMAN HILLENBRAND, filed, c/s.
DEC 9	MD 70	Memorandum of various Ps in oppos to D's mtn to dismiss under R.R.C.P. Rule 37(d) ‹Ralph DeMarco d/b/a Marco Tomato Co. v. The Atchison, Topeka & Santa Fe Railway Co. CA 74-2024-S & attached list of cases Marked "A"›
DEC 14	MD 72	TAURO, D.J.: FURTHER HEARING RE: MOTION TO INTERVENE (CLERK NOTES: RPTR: CURRY Mr. Goldings to provide to court a complete list of all cases in which he seeks to intervene w/in one week as well as to provide to all counsel. All other parties to file whatever necessary to protect their interest w/i one week thereafter. Parties ordered to meet and confer re: settlement on 12-21-87 @ 12-22-87 @ offices of Mr. Gleason between 9:30 a.m. & 4:00 p.m. All parties are ORDERED to be in attendance. Motion to Intervene taken under advisement. Administra-

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		tive closings remain in effect until Mr. Goldings files a list accompanied by a motion listing the 3,000 or so cases he refers to. List to be provided w/in one week.
DEC 14	MD 73	P's opposition to PENN CENTRAL's & VARIOUS RAILROADS' mtn s to dismiss for failure to prosecute, FILED, cs. [VARIOUS PLTFFS THE PENN CENTRAL CORP. & VARIOUS RAILROADS]
Dec 15	MD 74	Letter to Clerk from David W. Walsh dtd 12-15-87 enclosing copy of letter forwarded this date to Atty Goldings relating to the Mutual - Santa Fe Cases FILED.
Dec 21	MD 75	List of cases subject to mtns to intervene, FILED, cs. (Lists attached)
Dec 21	MD 76	List of cases subject to mtn to bring forward for further proceedings, FILED (Lists attached)
Dec 30	MD 77	Letter to Judge Tauro dtd 12-30-87 from Wesley S. Chused re: listed cases. After many conference over the past several months, Ps' offered a proposal that would resolve all outstanding lawsuits...Unfortunately, the Ps & the Proposed Intervenors rejected the proposal...Southern Pacific feels that under these circumstances, the Court should act upon the pending mtns...Southern Pacific submits that the Court should deny the mtn to intervene in the Mutual cases and should grant Southern Pacific's mtn to dismissd all other administratively cases under Rule 41(b). FILED. cs.
Dec 30	MD 78	Ds' reply to "LIST OF CASES" filed by proposed intervenors, FILED. cs.
Dec 30	MD 79	Affidavit of Michael A. McGourty, FILED. cs.
Dec 30	MD 80	Ds' oppos to Ps' mtn to bring forward for further proceedings. FILED. cs. ‹25 PS AS LISTED IN EX. "A" v. SOUTHERN PACIFIC, ET AL.›

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Dec 31	MD 81	Deft PENN Cental Corp." smtn to strike list of cases subject to mtns to inter FILED. cs. ‹Mutual Produce, Inc. v. Penn Central Corp.›
Dec 31	MD 82	Oppos of PENN CENTRAL to Receivers' mtn to bring forward for further proceedings FILED. cs.
Dec 21	MD 82A	Stipulation for order for extension of time to and including 01-05-88. FILED.

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Jan 05	MD 83	Oppos & memo in support of oppos to mtns to intervene of ROYAL PACKING CO., JOSEPH MAGGIO & JOHN M. CATALDO d/b/a NATIONAL FREIGHT TRAFFIC SERVICE, FILED. (Exhibit A attached listing cases in this action)
Jan 04	MD 84	Ds' mtn to dismiss under F.R.C.P. 41(b)(2), FILED. cs. ‹Various Ps v. The Atchinson et al.›
Jan 15	MD 85	TAURO, D.J.: PROCEDURAL ORDER, Entered. Cl for the PETITIONERS TO INTERVENE is instructed to submit to the court, or or before January 29, 1988, the basis for his standing to bring this mtn on behalf of these "Various Receiver-Pltf. IT IS SO ORDERED. cc/cl.
Feb 03	MD 86	TAURO, D.J.: MEMORANDUM, Entered. cc/cl.
"	MD 87	TAURO, D.J.: ORDER, Entered. For the reasons set forth in the accompanying memo, the Petitions to Intervene's mtns to intervene are DENIED. IT IS SO ORDERED. cc/cl. (Published)
05	MD 88	TAURO, D.J.: ORDER, Entered. Counsel for the Petitioners to Intervene having failed to respond to the attached procedural order, the mtn to bring forward certain cases for further proceedings is DENIED. IT IS ORDERED. cc/cl.
16	MD 89	Mtn to reconsider Order of February 3, 1988. FILED. cs. ‹Mutual Produce, Inc. v. The Penn Central Transportation Co., Et als...Variour Frieght Damages Case›

1988

Feb 16	MD 90	Mtn to reconsider Order of February 5, 1988. FILED. cs. ‹Various Receiver-P1 v. Various Railroad Defendants›
19	MD 91	Oppos of Consolidated Rail Corp.'s mtn to reconsider Order of February 3, 19 (MD 89) ‹Mutual Produce, Inc. v. Consolidated Rail Corp.›
"	MD 92	Oppos of Consolidated Rail Corp. to mtn to reconsider Order of February 5, (MD 90) ‹Various Receivers v. Consolidated Rail Corp.›
Feb 23		TAURO, D.J.: DENIED - DOCUMENT #89. cc/cl.
"		TAURO, D.J.: DENIED - DOCUMENT #90. cc/cl.
Mar 03	MD 93	John M. Cataldo, d/b/a National Frieght Traffic Service, Royal Packing Co. & Carl Joseph Maggio 's NOTICE OF APPEAL, FILED. cs. John M. Cataldo...et al. appeal the order of February 3, 1988 denying their mtns to intervene actions.
09		FOR THE PURPOSE OF APPEAL, M.B.D. #88-217-T ISSUED AS DOCKET No.
11		Certified copy of docket and original pleadings certified this date to Court of Appeals

Appendix C.

MASTER DOCKET
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
INTERSTATE FREIGHT DAMAGE CASES

1989

Apr. 4	01	MOTION to restore cases to active docket, FILED. cs.
	02	MEMORANDUM in support of pltfs' motions to restore case to active docket, FILED with attached listing of individual freight damage cases. cs.
14	03	OPPOSITION of Consolidated RAil Corp. to motion to restore cases (as per attached list) to active docket, FILED. cs.
04	04	Consolidated Rail Corp.'s MOTION TO DISMISS for failure to prosecute FILED. cs.
	05	MEMORANDUM in support of #4, FILED. cs.
Apr.10	06	OPPOSITION of Sunset Railway Co. to pltf's motions to restore case to active trial docket, FILED. cs.
	07	OPPOSITION of Texas Mexican Railway Co. to pltfs' motions to restore cases to active trial docket, FILED. cs.
	08	OPPOSITION of Stockton Terminal & Eastern Railroad to pltfs' motion to restore cases to active trial docket, FILED. cs.
	09	OPPOSITION of Atchison, Topek and Santa Fe Railway Co. to pltfs' motions to restore cases to active trial docket, FILED. cs.
	10	OPPOSITION of Boston and Maine Corp. to pltfs' motions to restore cases to active trila docket, FILED. cs.
12	11	MEMORANDUM of defts Southern Pacific Transportation Co., Holton Inter-Urban Railway Co., Santo Maria Valley

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Railroad Co., Stockton Terminal & Eastern Railroad, San Diego & Arizona Eastern Railway Co., Sunset Railway Co. and Northwestern Pacific Railway Co. (1) in OPPOSITION to motions to restore to active docket and bring forward for further proceedings and (2) in support of request for Rule 11 sanctions, FILED. cs.

Apr	12	12	MOTION by pltfs for leave to file reply to various defts' opposition to pltfs' motion to restore cases to active trail docket , and request for oral argument, FILED. cs.
	13	13	Deft Florida East Coast Railway Co.'s MOTION to dismiss pursuant to Rule 41(b) and Local Rule 19, FILED. cs.
		14	Florida East Coast Railway Co.,s OPPOSITION to pltfs' motions to restore cases to active docket and MEMORANDUM in support of its motion to dismiss, FILED. cs.
	19	15	(1) OPPOSITION of Penn Central Corp. to pltfs' motion to restore to active docket and (2) MOTION to impose sanctions with respect to same, FILED. cs.
	21	16	Letter from Atty. Troy re: #14 - original executed affidavits of Norman J. Richards and Aubrey D. Wages enclosed to be substituted for copies attached to #14, FILED.
	27	17	Pltfs' MOTION for enlargement of time (to respond to oppositions), FILED. cs.
	27		TAURO, D.J. RE: #17 - "Allowed. Plaintiffs response to be filed on or before May 5, 1989." cc/cl.
May	17	18	TAURO D.J. Hearing re: motion to restore to active docket. Arguments of counsel. Daniel Gleason to act as lead counsel for defendants. Parties are to prepare a memorandum of position with respect to each issue. Proposed Findings of Fact

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		referenced to any transcripts or pleadings to be filed by both pltf & defts by c/o/b June 16, 1989. Responses if any, shall be filed by c/o/b June 30th. When submissions are received, court will take matter under advisement.
June 16	19	Ps' Proposed Findings of Fact filed; CS.
	20	Various Ds' Proposed Findings of Fact filed; CS.
	21	Various Ds' Appendix to #20 filed.
08	22	Notice of Change of Counsel for Def. Florida East Coast Railway in 94 actions listed on Exh. A: withdrawal of appearances of Norman J. Richards and Paul E. Troy and appearance of Wesley S. Chused filed; CS.
20	23	Appearance of Andrew M. Osborne for Ps. in 74-2845-C, 76-2490-M, 77-0401-G and 77-0410-T filed.
	24	Appearance of Wesley S. Chused for Def. Southern Pacific Transportation in 74-2845-C, 76-2490-M, 77-0401-G and 77-0410-T filed.
	25	STIPULATION OF DISMISSAL with prejudice and without costs filed in 77-0410-T.
	26	STIPULATION OF DISMISSAL with prejudice and without costs filed in 74-2845-C.
	27	STIPULATION OF DISMISSAL with prejudice and without costs filed in 77-0401-G.
	28	STIPULATION OF DISMISSAL with prejudice and without costs filed in 76-2490-M.
30	29	REPLY of Receiver-Pltffs to Proposed Findings of Fact of RAILROAD Ds. FILED. cs.
30	30	Affidavit of FRANK INFELISE FILED. cs.
30	31	RESPONSE of Various Ds to Ps' Proposed Findings of Fact. FILED. cs.
30	32	AFFIDAVIT OF BERNARD F. O'RILEY. FILED.
July 10	33	REPLY AFFIDAVIT of WESLEY S. CHUSED in support of response of various Ds to Ps' proposed Findings of Fact ....ORIGINAL...(copy was filed on June 30, 1989 as Exhibits A) FILED. cs.

1989

July 17	34	Various Ds' mtn to strike reply of Receiver-Ps to proposed findings of fact of Railroad-Ds or alternatively for leave to file a reply. FILED. cs.
25	35	Receiver-Ps' oppos to Railroad-Ds' mtn to strike. FILED. cs.
27	36	TAURO, D.J.: MEMORANDUM, Entered. cc/cl.
27	37	TAURO, D.J.: ORDER, Entered. For the reasons stated in accompanying memo Pltff/interveners' mtns to restore are DENIED. IT IS SO ORDER.cc/cl.

*****

May 5	38	Deft Burlington Northern Railroad's motion to dismiss for failure to proescute and opposition to plts motion to restore cases to active docket, filed c/s
	39	Pltf's reply to various railroad-dfts oppositions to motions to restore cases to docket and motions to dismiss, field c/s
12	40	Letter to court from various defense counsel re: concerns over the May 5th reply memo and affidavit of John M. Cataldo that accompanied (Memo and "Cataldo Affidavit), filed (various attachments --including transcripts of 12/14/87 and 10/23/87 hearings),
15	41	Transcript of October 23, 1987 hearing, filed
17	42	Letter to court from pltf's counsel enclosing copy of 10/23/87 hearing transcript
May 16	43	Notice of Appearance by Helen Kazanjian filed on behalf of 20 Consolidated Railroad cases, filed
June 8	44	Notice filed by Atty Wesley Chused notifying court of change in counsel on 94 cases on behalf of deft Florida East Coast Railway Company
Aug 24	45	NOTICE OF APPEAL, Filed from order entered July 27, 1989

1989		
Sept 25		CERTIFIED COPY OF DOCKET, NOTICE OF APPEAL & ORDER OF JULY 27, 1989, FORWARDED to MARY CALLAHAN, U.S. COURT OF APPEALS.
25	46	Letter to Morris Goldings, Esqurie, from clerk requesting copies of document #'d 19 - 20 and 31.
Oct 12		Certified copy of docket & original pleadings forwarded to court of appeals.
Dec 26	47	USCA, ORDER OF COURT, Entered. Upon motion of appellants, and no opposition having been filed, IT IS ORDERED that hte aobve captioned appeal be DISMISSED. Each party shall bear its own costs. Appellees' motions to dismiss are MOOT. Mandate issued forthwith.
1990		
Mar 19	48	Pltf's motion for summary judgment (76-1850-S) FILED CS.
19	49	Memorandum of law in support of #48 FILED CS
19	50	Affidavit of John M. Caraldo in support of motion for summary judgment (76-1850-S) FILED
19	51	Pltf's motion for summary judgment (76-2028-G) FILED CS.
19	52	Memorandum in support of #51 FILED CS.
19	53	Affidavit of John M. Cataldo in support of motion for summary judgment (76-2028-G)
19	54	Pltf's motion for summary judgment (77-1911-S) FILED CS.

1990

Mar	19	55	Memorandum in support of #54 FILED CS
	19	56	Affidavit of John M. Cataldo in support of motion for summary judgment(77-1911 - S)
	19	57	Pltf's motion for summary judgment(77-2445-T) FILED CS.
	19	58	Memorandum in support of #57 FILED CS.
	19	59	Affidvit of John M. Cataldo in support of motion for summary judgment (77-2445-T)
	19	60	Pltf's motion for summary judgment (75-450-C) FILED CS.
	19	61	Memorandum in support of #60 FILED C.S
	19	62	AFFIDAVIT OF John M.Cataldo in support of motion for summary judgment (78-450-C)FILED
	28	63	Notice of withdrawal of appearance of Weld S. Henshaw as counsel for Burlington Northern Inc., (77-2445-T) FILED CS.
Apr	4	64	Deft's objections to the filing of pltf's motion for summary judgment and in support of its motion to dismiss (77-1911-T) FILED CS.
	4	65	Motion of defts Southern Pacific Transportation Co and Burlington Northern Inc to be consolidated before the Honorable Joseph L. TA (76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED CS.

1990

Apr 4	66	Defts motion for enlargement of time for 60 days to respond to pltf's motions for summary judgment (76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED CS.
4	67	Defts reply in opposition to pltf's motions for summary judgment 76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED CS
4	68	Exhibits to defts reply in opposition to pltf's motion for summary judgment (76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED
18	69	Pltf's reply to defts Southern Pacific Transportation Co's and Burlington Northern Inc., motions for consolidation and enlargement of time and opposition to motions for summary judgment (76-1850-S; 76-2028-G; 77-2445-T;78-450C) FILED CS.
18	70	Pltf's reply to deft's objections to filing motion for summary judgment (77-1911-S) FILED CS
23	71	Deft Railroads motion to enjoin pltfs from further prosecution of these lawsuits and for attorney's fees, costs and expenses (various Freight Damage Cases as listed in Appendix "A" hereto) FILED CS.
23	72	Memorandum in support defendant Railroads motion to enjoin pltfs further prosecution of these lawsuite(various Freight Damage Cases as listed in Appendix "A" hereto) FILED CS
23	73	Exhibits to #71 FILED
27	74	Defts' motion for leave to supplement their reply to pltf's motions for summary judgment (76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED CS.

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Apr 27	75	Defts supplemental reply in opposition to pltf's motions for summary judgment (76-1850-S; 76-2028-G; 77-2445-T; 78-450-C) FILED CS
27	76	Defts motion to strike pltf's reply to defts opposition to motions for summary judgment (76-1850-S;76-2028-G; 77-2445-T; 78-450-C) FILED CS.
May 9	77	Pltfs' opposition to defts' motion to enjoin pltfs from further prosecution, FILED.
9	78	Pltfs' opposition to defts' motion to strike (RE: 76-1850-S, 76-2028-G, 77-2445-T and 78-450-C), FILED.
June 20	79	TAURO, D.J. Hearing held re: why court should now deal w/ pltf's motions for summary judgment. Parties to submit a 10 page brief w/proposed orders. Briefs shall be consolidated for pltfs and defts. Parties instructed to confer re: settlement. If not settled briefs w/proposed orders to be filed w/i 21 days of break down in settlement negotiations.
Aug 13	80	MEMORANDUM of law of receiver-plaintiffs, FILED. cs.
13	81	Defts' SUPPLEMENTAL MEMORANDUM pursuant to court order, FILED. cs.
Sept. 10	82	TAURO, D.J. MEMORANDUM, entered. "...The pending motions are essentially motions to reconsider and vacate this court's prior orders. This court declines to do so. the pending motions, therefore, are denied." cc/cl
Sept. 26	83	NOTICE OF APPEAL re: 9/10/90 memo and order, FILED. cs. Fee pd.

1990		
Oct 3		Certified copy of docket & notice of appealforwarded to appeals clerk

[At the time of printing of this Appendix, the page of the docket sheet showing docket entries between October 4, 1990 and October 7, 1991, was not available. The text of the two relevant entries during that time period which are referred to in Respondents' opposition memorandum are set forth in full in App. H and I at pp. 34-36.]

1991		
Oct 7	1	TAURO D.J. Order Entered, for the Reasons stated in the acompanying Memo, this cases is hereby Dismissed cc/cl
7	2	TAURO, D.J. Memo Entered case DIsmissed.....
Nov 1	3	Pltf's notice of appeal filed c/s

Appendix D.

GENERAL DOCKET
FIRST CIRCUIT COURT OF APPEALS
CASE NO. 891928
VARIOUS RECEIVER PLAINTIFFS v.
PENN CENTRAL TRANSPORTATION CO., ET AL.

1989	
Oct. 2,	Notices of appeal and district court docket entry, received and filed. Case docketed and notices mailed (eml)
Oct. 10	Appearance of David W. Walsh, Esq., for the Defendants, Appellees, The Atchison Topeka and Santa Fe Railway Co., Sunset Railway Co., Stockton Terminal & Eastern Railroad, The Texas Mexican Railway Co., received and filed.(lp)
Oct. 10	Appearance of Richard J. Ferriter, Esq., for the Defendants, Appellees, Boston and Maine Corp., received and filed.(lp)
Oct. 11	Defendants Penn Central Transportation, Co., Consolidated Rail Corporation, Boston & Maine Corporation, The Atchison, Topeka and Santa Fe Railway Company, Sunset Railway Company, and Stockton Terminal and Eastern Railroad's Motion to Dismiss Appeal received and filed. (1b) Memorandum of defendants Penn Central Transportation, Co., Consolidated Rail Corporation, Boston & Maine Corporation, The Atchison, Topeka and Santa Fe Railway Company, Sunset Railway Company, and Stockton Terminal and Eastern Railroad in support of their Motion to Dismiss Appeal received and filed.(1b)
Oct. 11	Appearance of Daniel J. Gleason, Esq., and Michelle J. Lipton, Esq., for the Defendant, Appellee, The Penn Central Transportation, Co., recived and filed.(efp)

1989

Oct. 12.	ORDER: (Breyer, J.) Appellant is ordered to show cause why this appeal should not be dismiss by October 25, 1989. Notices mailed. (eml)
Oct. 12	Record on appeal in II Volumes consisting of pleadings # 1-46, received and filed. Notices mailed.(lp)
Oct. 16	Appearance of Morris M. Goldings, Esq., for the Plaintiffs-Appellants, received and filed.(lp)
Oct. 16	Appellees' motion to dismiss appeal received and filed. (lb) Memorandum of defendants-appellees Southern Pacific Transportation Company, Holton Inter-Urban Railway Co., Santa Maria Valley Railroad Company, Stockton Terminal & Eastern Railroad, San Diego and Arizona Eastern Railway Co., Sunset Railway Co., Northwestern Pacific Railway Co. and Flordia East Caost Railway Co. in support of their motion to dismiss appeal received and filed. (lb) Appearance of Wesley S. Chused, Esquire for appellees received and filed. (lb)
Oct. 18	Appearance of Helene Kazanjian, Esq., for appellees, recieved and filed. (efp)
Oct. 24	Appellant's Statement of Issues and Designation of Contents of Appendix, recieved and filed. (efp)
Oct. 25	Opposition to Defendant-Appellees' motion to dismiss, recieved and filed. (efp)
Oct. 25	Appellants' showing of cause why appeal should not be dismissed, received and filed. (efp)
Nov. 3	Appellees designation of contents of appendix, received and filed. (ac).
Nov. 17	Appellants' motion to voluntarily dismiss appeal pursuant to Rule 42(b) of Federal Rules of Appellate Procedure received and filed. (lb)

1989

Dec. 1	Order: (Selya, J.) upon motion of appellants, and no opposition having been filed, It is ordered that the above captioned appeal be dismissed. Each party shall bear its own costs. Appellees' motions to dismiss are moot. Notices mailed. (rm)
Dec. 26	Mandate issued, copy field. and original papers returned to the district court. Notices mailed. (ac)

Appendix E.

GENERAL DOCKET
FIRST CIRCUIT COURT OF APPEALS
CASE NO. 901963
VARIOUS RECEIVER PLAINTIFFS v.
PENN CENTRAL TRANSPORTATION CO., ET AL.

1990

Oct. 9	Copy of notice of appeal and district court docket entries received and filed. Case docketed and notices mailed.(jm)
Oct. 12	Record on appeal consisting of two (2) volumes received and filed. Notices mailed. (jm)
Oct. 15	Appearance of Frank Infelise, Esq. for hte plaintiff, appellant, received and filed. (Eml)
Oct. 15	Appearance of Daniel J. Gleason, Esq. and Michelle J. Lipton, Esq. for Penn Central Transportation Co., received and filed. (rm)
Oct. 15	Appearance of Morris M. Goldings, Esq. and Richard S. Jacobs, Esq. for appellants received and filed. (ji)
Oct. 15	Appearance of Richard J. Ferriter, Esq. and David W. Walsh, Esq. for appellees received and filed. (ji)
Oct. 16	Appearance of Wesley S. Chused, Esquire, as counsel for the appellees, Southern Pacific Transportation Company and Burlington Northern, Inc., received and filed. (db)
Oct. 18	Appearance of Paul F. Ware, Esq., adn Keven W. Clancy, Esq., as counsel for the appellees, received and filed. (db)
Oct. 23	Appellant's Designation Of Contents Of Appendix And Statement Of Issues received and filed. (db)

1990

Oct. 25 Appellant's Corrected Designation of Contents of Appendix received and filed. (db)

Nov. 6 Motion to dismiss appeal pursuant to Rule 27.1 of the FRAP with First Circuit Rules; Memorandum in support of motion to dismiss pursuant to Rule 27.1 of the FRAP with First Circuit Rules received and filed. (ji)

Nov. 13, Motion filed. Order: (Selya, J.) It is ordered that the time for filing appellant statement of issues and designation of the contents of the appendix to the briefs be enlarged to and including December 17, 1990. It is further ordered that the time for filing the brief for appellant and appendix to the brief be, enlarged to and including January 4, 1991. Notices mailed. (eml)

Nov. 14 Plaintiff-appellants' opposition to defendant-appellees' motion to dismiss appeal received and filed. (lb)

Dec. 14 Appellant's Statement of Issues And Amended Designation Of Contents Of Appendix received and filed. (db)

1991

Jan. 3 ORDER: (Campbell, Selya and Cyr, JJ) granting the appellees' motion to dismiss for reasons stated in said order. Notices mailed. (ji)

Jan. 7 Motion of plaintiffs-appellants for vacation of order of the court entered January 3, 1991 and for hearing thereon received and filed. (bf)

Jan. 15 Defendants-appellees' response to plaintiffs-appellants' "Motion to Vacate" received and filed. (lb)

Feb. 6 ORDER: (Torruella, J.) The motion to vacate our order of January 3, 1991 and for hearing thereon is denied. Notices mailed. (jm)

1991

Feb. 14 Mandate issued. Copy filed. Original papers returned to the district court. Notices mailed. (pm)

Appendix F.

GENERAL DOCKET
FIRST CIRCUIT COURT OF APPEALS
CASE NO. 912188
VARIOUS RECEIVER PLAINTIFFS v.
VARIOUS RAILROADS ET AL.

1991

Nov. 22 Record on appeal in one volume, received and filed. Case docketed and notices mailed. (ac)

Nov. 27 Appellees motion to dismiss appeal, received and filed. (ac)
Appellees memorandum in support of motion to dismiss appeal received and filed. (ac)
Appendix of defendants, appellees, received and filed. (ac)

Nov. 29 Appearance of Wesley S. Chused, Esq. for appellees, received and filed. (ac)

Nov. 29 Appearance of Daniel J. Gleason,Esq. and Michelle J. Lipton, Esq. for appellee, received and filed. (ac)
Appearance of Richard J. Ferriter, Esq. for appellee, received and filed.(ac)

Dec. 4 Appellant's statement of issues and designation of the contents, received and filed. (ac)
Appearance of Morris M. Goldings, Esq. and Richard S. Jacobs, Esq. for appellants received and filed. (ac)
Appearance of Susan M. Insoft, Esq. for appellee, received and filed. (ac)
Appearance of David W. Walsh, Esq. for appellee, received and filed. (ac)

1991

Dec. 12 Appellee's designation of contents and appendix, received and filed (ac)

Dec 26 Brief and 3 volumes of appendix of appellant received and filed Notices mailed. (bf)

1992

Jan. 7 Motion filed. ORDER: (Campbell, J.) enlarging the time for appellees to file its brief to and including February 17, 1992. Notices mailed. (ac)

Jan 17 Appellants opposition to any further extension of time to file appellees brief, received and filed. (ac)

Jan. 30 Motion for Extension of Time Pending Decision on Summary Disposition, received and filed.(db)

Feb. 4 Appellants opposition to railroads second motion for extension of time to file brief, received and filed. (ac)

Feb. 4 ORDER: (Seyla, J.) The motion for an extension of time is granted and the time of filing appellees' brief is hereby enlarged to and including March 16, 1992. Notices mailed. (ac)

Feb. 21 ORDER: (Torruella, Campbell, Selya, JJ) We have considered the motion to dismiss and the opposition therto, including appellants' brief, and the record on appeal. We agree with appellees' contention that no substantial question is presented and affirm essentially for the reasons stated in the district court's memorandum of October 7, 1991. Affirmed. Loc.R. 27.1. Notices mailed. (ac)

March 16, Mandate issued, copy filed original papers returned to district court. Notices mailed. (ac)

May 26 Notification from the Supreme Court that on May 20, 1992, a petition for writ of certiorari, Supreme Court No. 91-1845, October 1991 Term, received and filed.(db)

Appendix G.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1963

VARIOUS RECEIVER PLAINTIFFS,
Plaintiffs, Appellants,

v.

PENN CENTRAL TRANSPORTATION CO., ET AL.,
Defendants, Appellees.

Before

Campbell, Selya and Cyr,
Circuit Judges.

ORDER OF COURT

Entered January 3, 1991

We have considerable doubt whether the notice of appeal describes the appellants with sufficient specificity. See Torress v. Oakland Scavenger Co., 487 U.S. 312 (1988); see Santos-Martinez v. Soto-Santiago, 863 F.2d 174, 176 (1st Cir. 1988) ("That the appellees and the court might, by further inquiry, eventually ascertain the identity of the actual appellants is not enough, as the Torres Court has indicated in its near-unanimous decision.") We need not answer the question definitively, for

nothing turns on it. Assuming we have appellate jurisdiction, we would conclude that dismissal is appropriate. We find neither error nor abuse of discretion in (1) the district court's interpretation of the most recent motions for summary judgment to be nothing more than essentially repetitive motions to reconsider and vacate its prior orders and (2) its declination to do so. And, the underlying cases, being stale, were properly dismissible for want of prosecution, in any event.

We, therefore, grant the appellees' motion to dismiss since it "clearly appear[s] that no substantial question is presented." Loc. R. 27.1.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: ss/DANIEL F. LOUGHRY
Chief Deputy Clerk

[cc: Messrs. Goldings, Jacobs, Infelise, Walsh, Ferriter Ware, Clancy, Chused, Gleason, Osborne]

Appendix H.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

VARIOUS RECEIVER-PLAINTIFFS,	)	
Plaintiffs,	)	
v.	)	FREIGHT DAMAGE CASES
VARIOUS RAILROAD-DEFENDANTS,	)	
Defendants.	)	

PLAINTIFF-RECEIVERS' MOTION
FOR DETERMINATION OF STATUS OF CASES

The Plaintiff-Receivers hereby respectfully request this Honorable Court to determine the status of the several pending freight damage cases. The Docket Numbers of these cases are attached hereto and marked "A". In support of this Motion the Plaintiff-Receivers state that they belive that there has been sufficient activity in the freight damages cases since their filing to constitute the cases aspending and eligible for further procedings and that the cases may not now be dismissed for inactivity. Motions to Dismiss filed by some Defendants with

respect to certain of the cases from time to time have not been ruled upon. In *Blanchette v. Cataldo*, the Court specifically declined to dismiss the cases. Attached hereto and marked "B" is a Summary of Litigation Acitivity between the Plaintiff-Receivers and the Defendant Railroads from 1978 to the present.

The Plaintiff-Receivers also respectfully seek clarification as to whether and, if so, by what procedure or rule all of the remaining freight damages cases (as distinguished from those on which there has been an adjudication) have in fact been transferred to The Honorable Joseph Tauro for disposition, in order tha they may otherwise pursue their remedies before the various judges to whom the cases were originally assigned.

In further support of this Motion, the Plaintiff-Receivers state that these cases constitute valuable property rights of theirs which they wish to assert and request that the Court hold a hearing or conference with all interested parties to determine the most efficient and fair procedure for resolution of these cases consistent with their unique litigational history. The Plaintiff-Receivers suggest that, in view of the application of Rule III(H) of *The Guide to Judiciary Policies and Procedures* to these case, the Court may wish to enlist the services of the Administrative Office of the District Courts in resolving these matters.

VARIOUS RECEIVER-PLAINTIFFS,

By their Attorneys,

_____

Morris M. Goldings
Richard S. Jacobs
MAHONEY, HAWKES & GOLDINGS
40 Rowes Wharf
Boston, Massachusetts 02110
(617) 439-7600

Dated: June , 1991

Appendix I.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs, Plaintiffs,	*	
v.	*	Various Freight Damage Cases
Various Railroad-Defendants, Defendants.	*	

ORDER

July 17, 1991

TAURO, D.J.

Pursuant to Local Rule 41.1(b)(1), the parties are hereby ordered to appear at a hearing on August 26, 1991 at 10 a.m. to show good cause why these actions should not be dismissed for want of diligent prosecution. Each party shall serve and file a certificate in compliance with Local Rule 41.1(b)(1) by August 9, 1991.

IT IS SO ORDERED.

_____

United States District Judge